Evidence in Criminal Domestic Violence Cases

CHAPTER 5

In This Chapter...

5.1 Chapter Overview

This chapter addresses evidentiary problems that are likely to arise in criminal cases involving allegations of domestic violence.* These problems stem from three circumstances that are commonly present in crimes between intimates:

*Although the focus of this chapter is on criminal proceedings, many of the evidentiary questions discussed here are also relevant to civil proceedings.

1) From an evidentiary point of view, some criminal trials on charges involving allegations of domestic violence may be similar to murder trials in that the victim will not appear as a witness. As noted in Section 1.6(C), some domestic violence victims may be unwilling or unable to participate in court proceedings as a result of injury, coercion, ambivalence about the outcome of court proceedings, or lack of confidence in the justice system. Other victims may be ineffective witnesses due to the traumatic effects of the abuse. In such cases, courts may be requested to rule upon the admissibility of the following forms of evidence:

- **F** Former testimony of an unavailable witness.
- **F** Audiotaped evidence.
- **F** Photographic evidence.
- **F** Business records of medical or police personnel.
- **F** Statements made for purposes of medical treatment or diagnosis.
- **F** Statements offered under the "catch-all" hearsay exception.
- **F** Expert testimony about domestic abuse and its effects.

The admissibility of such evidence is addressed in Sections 5.2 - 5.8 of this chapter. For discussion of prosecutorial discretion and the absent witness, see Section 1.6(D).

2) Michigan law protects privacy rights by giving the parties to certain relationships the privilege to protect communications made during the relationship. In cases involving allegations of domestic violence, the privileges most often at issue are those protecting marriage and relationships with medical or mental health care providers. These privileges are the subject of Sections 5.9 - 5.10 of this chapter.

3) As noted in Section 1.2, domestic violence involves ongoing abusive behavior perpetrated in order to control an intimate partner. Accordingly, evidence of the parties' past interactions may become relevant in criminal cases involving allegations of domestic violence. Such evidence may concern:

- The complainant's past sexual relationship with the defendant.
- The defendant's other wrongful acts against the complainant.
- The defendant's threats against the complainant or other witnesses.

These subjects are discussed in Sections 5.11 - 5.13 of this chapter.

5.2 Former Testimony or Statements of Unavailable Witness

*See Section 1.6(C) on reasons why a witness in a domestic violence case may be unavailable. For a general discussion of the hearsay rule, see Section 5.7.

In cases involving allegations of domestic violence, the complaining witness is sometimes unavailable to testify at trial or other court proceedings. In such cases, the prosecutor may seek admission of the witness's earlier testimony or other statement as substantive evidence at trial under exceptions to the hearsay rule contained in MRE 804(b)(1) and (6), which are the subject of this section.*

A. Admissibility of Former Testimony Under MRE 804(b)(1)

MRE 804(b)(1) provides:

> "(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> "(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

See also MCL 768.26; MSA 28.1049, which states:

> "Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the

> trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify."

MRE 804(a) defines "unavailability" as follows:

> "(a) *Definition of unavailability.* 'Unavailability as a witness' includes situations in which the declarant —
>
> "(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> "(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> "(3) has a lack of memory of the subject matter of the declarant's statement; or
>
> "(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> "(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance...by process or other reasonable means, and in a criminal case, due diligence is shown.*
>
> "A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

*On the effort to procure the declarant's attendance required under MRE 804(a)(5), see *People v Bean*, 457 Mich 677, 684 (1998).

In *People v Adams*, 233 Mich App 652 (1999), the Court of Appeals considered the issue of "unavailability" when a complaining witness did not appear to testify at trial against her former boyfriend, who was charged with assault with intent to commit murder and other offenses.* The complainant had previously appeared to testify at a preliminary examination that was adjourned and rescheduled. After the adjournment, the mother of defendant's new girlfriend shot at the complainant. After this incident, the complainant reluctantly testified at the rescheduled preliminary examination, but on the morning of defendant's trial, she was upset and nervous about testifying against defendant. She abruptly left the courthouse without warning before the trial began. After an unsuccessful two-hour search for her, the prosecutor asked the court either to adjourn the trial or to declare her unavailable and to admit into evidence her preliminary examination testimony under MRE 804(b)(1). The trial court dismissed the charges, opining that the complainant may have simply changed her mind about pursuing the charges. On appeal, the Court of Appeals held that the trial court abused its discretion by excluding the complainant's preliminary examination testimony from evidence at trial. 233 Mich App at 656. The Court of Appeals found that the complainant's abrupt departure and evasion from detection made her "unavailable" under the "ordinary meaning of the word" and for purposes of MRE 804(a)(2). In light of her unavailability, the trial court should have admitted her former testimony into evidence under MRE 804(b)(1). The Court of Appeals further noted that use of the preliminary examination testimony would not violate defendant's constitutional right to confront witnesses. 233 Mich App at 658-659.

*This case is also discussed in Section 1.6(C)(2).

*This case is also discussed in Section 1.6(D).

See also *People v Williams*, 244 Mich App 249 (2001), in which the Court of Appeals found that the trial court erroneously dismissed charges against the defendant based on the absence of the complaining witness, and remanded for a determination of whether the witness was "unavailable" to testify at trial under MRE 804(a)(5).*

B. Statements by Witnesses Unavailable by an Opponent

Effective September 1, 2001, MRE 804(b)(6) is added to MRE 804, as follows:

> "(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ...
>
> "(6) *Statement by declarant made unavailable by opponent.* A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

On the definition of "unavailability," see MRE 804(a), which is discussed in Section 5.2(A).

5.3 Audiotaped Evidence

This section addresses the admissibility of 911 tapes and other types of audiotapes. The discussion concerns three issues that commonly arise when such evidence is introduced at trial:

- Authentication of audiotaped evidence (MRE 901).
- Hearsay objections to audiotaped evidence (MRE 803, 804).
- Weighing the probative value of audiotaped evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury (MRE 403).

A. Authentication of Audiotaped Evidence

Authentication of all types of evidence is governed by MRE 901(a), which generally provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(b) then provides a non-exhaustive list of authentication techniques that meet the requirements of MRE 901(a). Two of these examples apply directly to audiotaped evidence. They are:

> "(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

> "(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone."

In *People v Berkey*, 437 Mich 40 (1991), the Michigan Supreme Court considered the admissibility of audiotapes recorded by a murder victim several months before her death. The tapes contained recordings of conversations between the victim and her husband, who was convicted of her murder. The tapes were played for the jury at trial, after authentication by the victim's neighbor, who identified the voices on the tapes as those of the victim, the defendant, and their children. At a previous hearing on admissibility of the tapes held outside the presence of the jury, the neighbor testified that she was not present when the tapes were made, and did not know: 1) what tape recorder was used; 2) who made the tapes; 3) whether the tapes contained entire conversations or only portions of conversations; 4) whether the tapes had been changed in any way; or 5) whether the statements on the tapes were made voluntarily.

Applying MRE 901(a), the Supreme Court in *Berkey* held that the audiotapes had been sufficiently authenticated: "[A] tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more." 437 Mich at 50. In so holding, the Supreme Court noted that prior to the 1978 adoption of MRE 901, questions of authentication had been governed by *People v Taylo*r, 18 Mich App 381 (1969). The Court of Appeals in *Taylor* adopted a seven-part test to determine the admissibility of sound recordings. This test required:

> "(1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement." 18 Mich App at 383-384.

Although the *Taylor* test has been superseded by MRE 901, the Supreme Court in *Berkey* acknowledged that the seven *Taylor* elements are still important considerations for the finder of fact in weighing the evidence. Moreover, the Supreme Court left open the possibility that judicial consideration of the seven *Taylor* elements might in other cases lead to the exclusion of audiotaped evidence:

> "[W]e do not exclude the possibility that, on other facts or upon a different record, elements of the seven-part test (or other relevant considerations) might lead to the exclusion of recorded conversations, notwithstanding testimony that identifies the voices on the tape. Depending on the circumstances, such an exclusion could be premised on a determination that the recording lacks authenticity, or that it lacks probative value, or that it is subject to exclusion notwithstanding its probative value." 437 Mich at 53.

B. Hearsay Objections to Audiotaped Evidence

Not all information on a 911 tape will fall within the definition of hearsay. MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In *City of Westland v Okopski,* 208 Mich App 66, 77 (1994), admission of the tape recording of a 911 call was not prohibited by the hearsay rule because it was offered to show why the police responded rather than to prove the truth of the matter asserted.

In addition, for purposes of the hearsay rule, a "statement" is defined in MRE 801(a) as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." In *People v Slaton,* 135 Mich App 328, 335 (1984), the Court of Appeals found that background noises in a 911 tape were not hearsay because they were not statements.*

*For general discussion of the nature of hearsay, see Section 5.7.

In cases where audiotaped evidence does fall within the definition of "hearsay," Michigan appellate courts have upheld trial court decisions admitting 911 tapes as evidence under the present sense impression, excited utterance, and dying declaration exceptions to the rule against hearsay.

1. Present Sense Impression Exception Under MRE 803(1)

A present sense impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." A present sense impression is admissible even though the declarant is available as a witness. MRE 803(1).

In *People v Hendrickson*, 459 Mich 229 (1998), the Michigan Supreme Court reviewed the trial court's decision to admit a 911 audiotape recording into evidence at defendant's trial on charges of domestic assault. According to the evidence, the complainant telephoned 911 at 12:43 a.m. and stated, "I want someone to pick up" the defendant. In response to the dispatcher's request for further explanation, the complainant stated, "I have just had the living s- beat out of me," that the defendant was "leaving the house now," and that she herself was leaving to seek medical treatment. At 7:00 a.m., a police officer interviewed the complainant, who described being grabbed around the neck, thrown to the floor, and pummeled by the defendant. The officer photographed the complainant's injuries; these photographs were also admitted into evidence at trial. In holding that the trial court properly admitted the audiotape recording under MRE 803(1), the Supreme Court set forth the following three conditions for admission of evidence under the present sense exception to the hearsay rule, 459 Mich at 236:

- The statement must provide an explanation or description of the perceived event.
- The declarant must personally perceive the event.
- The explanation or description must be substantially contemporaneous with the perceived event.

Additionally, four Justices held that evidence is admissible under MRE 803(1) only if there is corroborating evidence that the perceived event occurred. 459 Mich at 237-238 (lead opinion of Justice Kelly), and 251, n 1 (concurring and dissenting opinion of Justice Brickley). Three of these Justices found that the photographic evidence of the victim's injuries satisfied this requirement in this case. 459 Mich at 239-240 (lead opinion of Justice Kelly). Justice Brickley dissented because he would require corroborating evidence of substantial contemporaneity and he found no such evidence in this case. 459 Mich at 251-252. The other three Justices concurred in the holding that the trial court properly admitted the audiotape recording under MRE 803(1), but disagreed that the present sense impression exception requires corroborative evidence of the underlying event as a prerequisite to admissibility. 459 Mich at 240-241 (concurring opinion of Justice Boyle).

See also *People v Slaton*, 135 Mich App 328, 334 (1984), in which the Court of Appeals found no error in admission of a tape of the murder victim's 911 call, ruling in part that, "[The victim's] statements to [the 911 operator] informing her that some person or persons had broken into his basement as he spoke described an event as he was perceiving that event and were therefore admissible as present sense impressions under MRE 803(1)." *People v Slaton* is further discussed in Sections 5.3(B)(2) and 5.3(C).

2. Excited Utterance Exception Under MRE 803(2)

An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." An excited utterance is admissible even though the declarant is available as a witness. MRE 803(2).

In *People v Kowalak (On Remand)*, 215 Mich App 554, 557 (1996), the Court of Appeals described the three prerequisites to admission of evidence under the excited utterance exception to the hearsay rule:*

**People v Kowalak* is discussed in more detail in Section 5.13.

- The statement must arise out of a startling event.
- The statement must relate to the circumstances of the startling event.
- The statement must be made before there has been time for contrivance or misrepresentation by the declarant.

Additionally, the Michigan Supreme Court has held that in order to admit evidence of an excited utterance, some independent proof — direct or circumstantial — must be offered that the startling event took place. The proffered excited utterance by itself is not sufficient to establish that the startling event took place. *People v Burton,* 433 Mich 268, 294-295 (1989). See also *People v Layher*, 238 Mich App 573, 583 (1999), lv granted on other grounds 463 Mich 906 (2000) (strong circumstantial evidence was sufficient to establish independent proof that a sexual assault occurred).

The hearsay exception in MRE 803(2) assumes that a person who has been excited by a startling event will not have the reflective capacity to fabricate,

so that his or her statement will be spontaneous and trustworthy. The dispositive question is not strictly one of time, but of the capacity for conscious reflection that would give rise to possible fabrication. Accordingly, there is no fixed time limit that applies in determining whether a declaration comes within the excited utterance exception. The Michigan Supreme Court has found that an excited state may last for many hours after the occurrence of a startling incident. In *People v Smith*, 456 Mich 543 (1998), the defendant appealed from his conviction of first-degree criminal sexual conduct, asserting that the trial court should not have applied the excited utterance exception to admit a hearsay statement made ten hours after the alleged criminal incident occurred. A majority of the Supreme Court affirmed the conviction, holding that the statement was admissible as an excited utterance. The Court found that the statement was reliable and admissible because the declarant made it while still under the overwhelming influence of the assault. 456 Mich at 551-553.

**People v Layher* is also discussed in Section 5.12(C). *People v Slaton* is also discussed in Sections 5.3(B)(1) and 5.3(C).

Similarly, in *People v Layher, supra*, 238 Mich App at 583-584, the Court of Appeals applied MRE 803(2) to uphold the trial court's decision to admit into evidence statements made by a five-year-old victim of sexual assault. The Court found that the victim was in a continuing state of emotional shock precipitated by the assault when she made the statements during therapy one week after the alleged assault and with the aid of anatomical dolls. See also *People v Kowalak*, *supra*, 215 Mich App at 559-560 (excited utterance exception applicable notwithstanding delay of 30 to 45 minutes between death threat and statement) and *People v Slaton*, 135 Mich App 328, 334-335, (1984) (tape recording of the statements of both a caller and a 911 operator were admissible because they related to a startling event and were made under the stress of that event.)*

3. Dying Declarations Exception Under MRE 804(b)(2)

A dying declaration is defined as "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." A dying declaration is admissible only when the declarant is not available to appear as a witness in either a criminal prosecution for homicide or in a civil action. MRE 804(b)(2).

The Court of Appeals held that a 911 tape was admissible under the dying declaration exception in *People v Siler*, 171 Mich App 246 (1988). Here, the defendant appealed from a conviction of second-degree murder, challenging the district court's decision to bind him over for trial based on an audiotape made when the victim called 911 for an ambulance. The district court admitted the tape over defendant's hearsay objection as a dying declaration under MRE 804(b)(2). On the tape, the victim told the dispatcher that he had been stabbed in the heart, that he needed immediate assistance, and that the defendant had committed the stabbing. The defendant asserted on appeal that the statement was not a dying declaration because the victim was not conscious of his impending death. The Court of Appeals upheld the district

court's decision to admit the 911 tape. The Court noted that this case involved the first of four prerequisites to admission of a hearsay statement as a dying declaration in a criminal action: 1) the declarant must have been conscious of impending death; 2) death must have ensued; 3) the proponent of the statement seeks its admission in a criminal prosecution against the person charged with killing the decedent; and 4) the statement must relate to the circumstances of the killing. 171 Mich App at 251. With respect to the "consciousness of death" requirement, the Court stated:

> "'Consciousness of death' requires, first, that it be established that the declarant was in fact *in extremis* at the time the statement was made and, secondly, that the decedent believed his death was impending. But, it is not necessary for the declarant to have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration." *Id.*

The Court of Appeals found that the record established the decedent's consciousness of impending death. The decedent told the dispatcher that he needed immediate help, repeating this request three times. A forensic pathologist testified that the decedent remained conscious for four to five minutes after the wound was inflicted, and was pronounced dead about an hour and a half later, not having regained consciousness. 171 Mich App at 251-252.*

**People v Siler* is also discussed in Section 5.3(C).

C. Exclusion of Audiotaped Evidence Under MRE 403

MRE 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In the following cases, the Court of Appeals reviewed trial court decisions to admit 911 tapes into evidence over defense objections based on MRE 403.

F *People v Slaton*, 135 Mich App 328 (1984):

At the defendant's trial for felony murder, a 911 operator testified regarding a call from the victim of this crime. During the call, the victim reported that a person had broken into his home. The operator spoke to the victim for approximately five minutes before she heard the phone drop. The operator then heard banging noises, the victim yelling, and two voices demanding money. The prosecutor also introduced portions of a tape of the 911 call into evidence under the excited utterance and present sense impression exceptions to the hearsay rule.* On appeal from his conviction, the defendant challenged the admission of the 911 tape, asserting that it was not relevant to his identification as one of the perpetrators of the crime. He alternatively argued that the tape's probative value was reduced by the availability of the operator's in-court testimony, and that the prejudicial effect of the tape outweighed its probative value. The Court of Appeals held that the 911 tape was relevant because it was highly probative of at least two issues: 1) whether the victim's injuries were inflicted by the perpetrators of the breaking and entering; and 2) whether the defendant's alibi testimony was credible. 135 Mich App at

*Present sense impressions and excited utterances are discussed in Sections 5.3(B)(1)-(2).

332-334. The Court further found that the probative value of the tape was not outweighed by its potentially prejudicial nature:

> "Included in the edited portions of the 911 tape heard by the jury were [the victim's] calls for help and pleas not to be hurt, followed by his muffled moans. We agree with defendant that these sounds were likely to elicit an emotional response from the jury. We do not, however, agree that the effect of these sounds upon the jury was so prejudicial to the issue of defendant's guilt or innocence as to require exclusion of this otherwise highly probative evidence. Defendant's voice was not identified as one of the voices on the tape, leaving the question of defendant's involvement in the crime to be decided in light of other evidence. We cannot say that the trial court abused its discretion in its balancing of the probative value and prejudicial effect of the 911 tape as evidence." 135 Mich App at 334.

- **F** *People v Siler,* 171 Mich App 246 (1988):

  The defendant was convicted of second-degree murder, after the district court bound him over for trial based on an audiotape made when the victim called 911 for an ambulance. On the tape, the victim told the dispatcher that he had been stabbed in the heart, and that the defendant had committed the stabbing. The district court admitted the tape as a dying declaration under MRE 804(b)(2).* In addition to objecting to introduction of the tape on hearsay grounds, the defendant asserted on appeal that it should have been excluded under MRE 403 because it was more prejudicial than probative. The Court of Appeals disagreed:

  > "[The victim's] statement that defendant had stabbed him was relevant because it was proof of the crime of murder with which defendant was charged. The tape was extremely probative because no one saw defendant stab [the victim]. Evidence of guilt is always prejudicial. Only if it would unfairly prejudice defendant should probative evidence be excluded. We hold that defendant was not unfairly prejudiced by the admission of this evidence and that the trial court did not abuse its discretion in admitting the 911 tape." 171 Mich App at 252-253. [Citation omitted.]

*Dying declarations are discussed in Section 5.3(B)(3).

See also *People v Schmitz*, 231 Mich App 521, 534-535 (1998) (Although a tape recording of an eyewitness's 911 telephone call was generally cumulative to the eyewitness's trial testimony, no error to admit the tape into evidence because it was not unduly emotional.)

5.4 Photographic Evidence

This section addresses the admissibility of photographic evidence. The discussion concerns two issues that commonly arise when such evidence is introduced at trial:

- **F** Authentication of photographic evidence (MRE 901).
- **F** Weighing the probative value of photographic evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury (MRE 403).

A. Authentication of Photographic Evidence

Authentication of photographic evidence is governed by MRE 901(a). That rule provides generally:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

MRE 901 also provides a nonexclusive list of examples of appropriate means of authentication. See MRE 901(b)(1)-(10).

Proper authentication of a videotape was found in *People v Hack*, 219 Mich App 299, 308-310 (1996). In that case, the defendant was convicted of child sexually abusive activity based on a videotape depicting a three-year-old girl and a one-year-old boy who were forced to engage in sexual acts. Citing *People v Berkey*, 437 Mich 40, 50 (1991),* the Court of Appeals found that the videotape was properly authenticated under MRE 901(a) by the testimony of two witnesses who stated that it reflected events they had seen on the day in question.

**People v Berkey* is discussed in Section 5.3(A).

For a case addressing a photograph of a sexual assault victim, see *People v Riley*, 67 Mich App 320 (1976), rev'd on other grounds 406 Mich 1016 (1979). In *Riley*, the Court of Appeals upheld the trial court's decision to allow a photograph of the victim's bruised backside into evidence. This photograph was authenticated by the victim's testimony that it accurately reflected the condition of her body at the time the picture was taken. The appeals panel found this testimony sufficient authentication, stating that the photographer's testimony was not required:

> "All that is required for the admission of a photograph is testimony of an individual familiar with the scene photographed that it accurately reflects the scene photographed....We believe that a person is familiar with the appearance of one's own body, and therefore complainant was qualified to identify the picture in question." 67 Mich App at 322-323.

The Michigan Department of State Police has developed Standard Operating Procedures for handling digital images taken at crime scenes or autopsies, which are designed to ensure that the images remain unaltered and to establish the chain of evidence. These procedures require that images taken on a digital system be: 1) downloaded *unopened* to the hard drive of a computer; and 2) copied *unopened* from the computer hard drive onto a serial-numbered WORM (write once, read many times) compact disc. (Once an image is copied onto a WORM CD, it cannot be changed.) If requested by a prosecutor or defense attorney, copies of digital images will be made from this compact disc. The disc is to be handled with the same precautions as any other piece of evidence, with the same chain of custody concerns.

B. Relevancy Questions Under MRE 401 and 403

Substantive objections to photographic evidence in criminal cases are frequently based on questions of relevancy arising under MRE 401 and 403. MRE 401 defines "relevant evidence" as follows:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In general, "[a]ll relevant evidence is admissible." MRE 402. An exception to this general rule appears in MRE 403, which provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In *People v Mills*, 450 Mich 61 (1995), the Michigan Supreme Court applied MRE 401 and 403 to decide whether the trial court should have admitted 17 color slides of a victim's severe burn wounds in the trial of two defendants on charges of assault with intent to commit murder. The Supreme Court held that the trial court had properly admitted this evidence, finding it both relevant under MRE 401 and more probative than prejudicial under MRE 403.

In determining admissibility under MRE 401, the Supreme Court first considered whether the proffered slides were "material." To be material, a fact need not be an element of a crime, cause of action or defense, but it must be "in issue" in that it is within the range of litigated matters in controversy. 450 Mich at 68. The Court further noted that all elements of a criminal offense are "in issue" when a defendant pleads not guilty, and that evidence is not inadmissible merely because it relates to an undisputed issue. 450 Mich at 69, 71. Second, the Court addressed whether the proffered slides had "probative force," defined as *any* tendency to make a material fact more or less probable than it would be without the evidence. 450 Mich at 68.

Applying the foregoing principles, the Court decided that the slides were relevant evidence as required by MRE 401 because they were probative of facts "of consequence" in the case, namely, the elements of the crime and the credibility of witnesses (450 Mich at 68-74):

- They showed the nature and extent of injuries, which was probative of the defendants' intention to kill.
- They corroborated other evidence of the circumstances of the alleged crime.
- They demonstrated the victim's state of mind, which was relevant during cross-examination regarding inconsistent statements.

Having concluded that the slides were relevant under MRE 401, the Supreme Court in *Mills* considered whether their probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. In making this determination, the Court cited its opinion in *People v Eddington,* 387 Mich 551 (1972). In *Eddington*, the Supreme Court rejected the notion that the prosecution must pursue alternative proofs before resorting to photographic evidence, and adopted the following test for admissibility of photographs:

> "Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, *particularly if they are not substantially necessary or instructive to show material facts or conditions.* If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to that extent calculated to excite passion and prejudice, does not render it inadmissible in evidence.
>
> "When a photograph is offered the tendency of which may be to prejudice the jury, its admissibility lies in the sound discretion of the court. It may be admitted if its value as evidence outweighs its possible prejudicial effect, or may be excluded if its prejudicial effect may well outweigh its probative value." 387 Mich at 562-563, citing 29 Am Jur 2d, Evidence, §787, p 860-861. [Emphasis added.]

Applying this standard, the Supreme Court in *Mills* concluded that the relevancy of the slides was not substantially outweighed by the danger of unfair prejudice. The Court found that the slides were accurate factual representations of the victim's injuries, which did not present enhanced or altered representations. The Court further noted that in deciding to admit 17 slides into evidence, the trial judge had reviewed 30 out of 150 slides, excluding those that appeared to be repetitive, gruesome, or unfairly prejudicial. 450 Mich at 77-80.

In *People v Watson*, 245 Mich App 572 (2001),* the defendant was convicted of sexually assaulting his stepdaughter. On appeal, he challenged the trial court's admission into evidence of a cropped photograph, and an 8" x 10" enlargement of the photograph, showing the victim's naked buttocks. There was evidence that the defendant carried the cropped photograph in his wallet. He argued that the photograph was inadmissible because it was offered only to show that he was a "sexual pervert," which made it more likely that the victim's allegations of sexual abuse were true. The Court of Appeals disagreed, finding that the evidence was admissible under MRE 404(b) to show the defendant's motive to have sexual relations with his stepdaughter. Rejecting the defendant's argument that the evidence was inflammatory, the Court noted that the evidence had strong probative value and that the defendant had not shown that the danger of prejudice substantially outweighed that value. In addition, the Court found that the enlargement was

**People v Watson* is also discussed in Section 5.12(C).

properly admitted to show the entire photograph and that there was no reversible error in the admission of an 8" x 10" print instead of a smaller print. 245 Mich App 416-419.

See also *People v Riley*, 67 Mich App 320, 323 (1976), rev'd on other grounds 406 Mich 1016 (1979) (Photograph of a rape victim's bruised backside held admissible over objection that it was unduly prejudicial, where the defense was the consent of the victim.)

5.5 Business Records of Medical or Police Personnel

*See Section 5.6 on statements made for purposes of medical treatment or diagnosis.

Due to their hearsay nature, police and medical records are inadmissible at trial unless subject to an exception under MRE 803.* This section discusses two hearsay exceptions that may apply to these records — the exception for records of a regularly conducted activity under MRE 803(6), and the exception for public records and reports under MRE 803(8). These exceptions apply regardless of the declarant's availability as a witness.

A. Records of a Regularly Conducted Activity — MRE 803(6)

MRE 803(6) contains a hearsay exception for records of a regularly conducted activity, which are described as follows:

*MCL 600.2146; MSA 27A.2146 also addresses business records. To the extent that it is inconsistent with the Rules of Evidence, it is superseded. See MRE 101, and *People v Shipp*, 175 Mich App 332, 336-338 (1989).

> "A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."*

Under MRE 803(6), properly authenticated records may be introduced into evidence without requiring the records' custodian to appear and testify. See Staff Comment to September, 1, 2001 amendment to MRE 803(6). MRE 902(11) governs authentication of certified records of a regularly conducted activity, as follows:

> "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> ...
>
> "(11) *Certified records of regularly conducted activity*. The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule

> 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that —
>
> "(A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> "(B) The record was kept in the course of the regularly conducted business activity; and
>
> "(C) It was the regular practice of the business activity to make the record.
>
> "A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

For an example of a case in which police records were admitted into evidence under MRE 803(6), see *People v Jobson*, 205 Mich App 708 (1994), police records were admitted into evidence under MRE 803(6). In that case, a police officer took part in unauthorized police raids at two homes and was convicted of entering a building without the owner's permission. On appeal, the officer challenged the trial court's decision to admit into evidence his activity log, which made no reference to the raids in question. The Court of Appeals noted that police officers are required to record all patrol activity in an activity log, and held that the defendant's log was admissible into evidence under MRE 803(6) and MRE 803(7).* 203 Mich App at 713.

*MRE 803(7) concerns the absence of an entry in a record described in MRE 803(6).

For an example of a case in which a medical record was admitted into evidence under MRE 803(6), see *Merrow v Bofferding*, 458 Mich 617, 626-628 (1998). In that case, the Michigan Supreme Court held that part of the "History and Physical" contained in the plaintiff's hospital record was admissible under MRE 803(6). Evidence established that the "History and Physical" was compiled and kept in the regular course of business by the hospital.

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. In the following cases, the appellate courts found that the proffered business records were not trustworthy because they were prepared in anticipation of litigation.

F *Solomon v Shuell,* 435 Mich 104 (1990):

The plaintiff filed a wrongful death action against the City of Detroit and Detroit police officers John Shuell, Michael Hall, and Richard Nixon, after Shuell shot and killed the plaintiff's husband. The trial court dismissed Nixon and granted a directed verdict in favor of Hall and the City or Detroit. The jury returned a special verdict finding that Shuell was negligent, and the trial court entered a judgment for the plaintiff in the amount of $20,000. On appeal, the plaintiff asserted that the trial court improperly admitted four police reports into evidence. Two of these reports were police department homicide witness statements taken during

the investigation of the shooting; these reports contained Shuell's and Nixon's versions of the shooting. The other two reports were preliminary complaint reports. In one of these, Hall described his conversation with Shuell immediately after the shooting. In the other report, Shuell described his actions leading up to the decedent's death. In plurality opinions, all seven Justices found that the business records exception in MRE 803(6) was inapplicable because the proffered reports were not trustworthy. The officers making the records in this case had motivation to misrepresent the facts — their statements were taken during the course of a police homicide investigation that could have resulted in civil liability, a criminal prosecution, or interdepartmental discipline. 435 Mich at 126 (opinion of Justice Archer). This lack of trustworthiness went to the admissibility of the reports, not merely to the weight they should be given by the factfinder. 435 Mich at 128 (opinion of Justice Archer).

F *People v Huyser,* 221 Mich App 293 (1997):

The defendant was charged with first-degree criminal sexual conduct involving his former girlfriend's daughter. The prosecution retained Dr. David Hickok as an expert witness. Dr. Hickok examined the victim and prepared a report stating his finding of evidence consistent with vaginal penetration. Dr. Hickok was named on the prosecution's witness list, but died prior to trial. A subsequent examination of the victim by a different physician revealed no evidence of vaginal penetration. At trial, the defendant and the prosecutor offered conflicting testimony regarding vaginal penetration. Over the defendant's objection, one of Dr. Hickok's employees read portions of his report to the jury. The trial court ruled that the report was admissible under MRE 803(6). The defendant was convicted of second-degree criminal sexual conduct. On appeal from his conviction, the defendant challenged the admission of Dr. Hickok's report into evidence. The Court of Appeals agreed, and reversed the defendant's conviction. It found that because Dr. Hickok had prepared the report in contemplation of the criminal trial, the report lacked the trustworthiness of a record generated exclusively for business purposes. The trustworthiness of the report was also undermined by the results of the subsequent examination.

Once a business record is admitted under MRE 803(6), each entry in the record must be admissible within the language of the rule as an act, transaction, occurrence, event, condition, opinion, or diagnosis recorded in the course of a regularly conducted business activity. If the document contains a hearsay statement, that statement is admissible only if it qualifies under a separate exception to the hearsay rule. MRE 805, *Merrow v Bofferding*, *supra*, 458 Mich at 627, and *Hewitt v Grand Trunk W R Co,* 123 Mich App 309, 315-316 (1983).

In *Hewitt v Grand Trunk W R Co,* a wrongful death action was brought by the widow of a man who was struck by a train. The trial court admitted into evidence a police accident report containing eyewitnesses' statements that the decedent jumped into the train. The jury found in favor of the defendant railroad, and the plaintiff appealed, asserting that the accident report was admitted into evidence in violation of the hearsay rule. The Court of Appeals

reversed and remanded for a new trial, holding that the eyewitnesses' statements in the police report were not admissible. In response to the defendant's contention that the entire report was admissible as a record of a regularly conducted activity under MRE 803(6), the Court noted that the eyewitnesses' statements did not fall within the regular course of their business, so that the primary foundational requirement for this exception was lacking. 123 Mich App at 325.

B. Public Records and Reports — MRE 803(8)

MRE 803(8) contains a hearsay exception for:

> "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624; MSA 9.2324."*

*MCL 257.624; MSA 9.2324 prohibits the use in a court action of a report required by Chapter VI of the Vehicle Code.

The hearsay exception in MRE 803(8) does not allow the introduction of evaluative or investigative reports. The exception extends only to "reports of objective data observed and reported by [public agency] officials." *Bradbury v Ford Motor Co*, 419 Mich 550, 554 (1984) (holding inadmissible a National Highway Traffic Safety Administration report regarding alleged malfunctions in automotive transmissions). *People v Shipp*, 175 Mich App 332, 339-340 (1989), further illustrates this distinction. The defendant in *Shipp* was convicted of involuntary manslaughter arising from his wife's death. On appeal, he asserted that the trial court erroneously permitted the prosecution to read an autopsy report into evidence. This report contained recorded observations about the body, as well as the medical examiner's opinion and conclusion that death ensued after attempted strangulation and blunt instrument trauma. The Court of Appeals granted the defendant a new trial, holding that the conclusions and opinions contained in the autopsy report were inadmissible under MRE 803(8)(B). The Court noted, however, that the examiner's recorded observations about the decedent's body were admissible under the rule.

> **Note:** A medical examiner's opinion as to the cause of death may be admissible as a record of a regularly conducted activity under MRE 803(6), which was amended after the decision in *Shipp* to include "conditions, opinions, or diagnoses." The Court of Appeals in *People v Shipp* found the autopsy report inadmissible under the business records exception created by MRE 803(6), which at the time extended only to "acts, transactions, occurrences, or events" recorded in the course of a business. 175 Mich App at 338-339. See Section 5.5(A) for discussion of the current business records exception.

Due to Confrontation Clause concerns, MRE 803(8) precludes the admission of certain police reports in criminal cases. This restriction extends to reports of observations made at crime scenes or while investigating crimes. See *People v Tanner,* 222 Mich App 626, 629-630 (1997) (search warrant

affidavit inadmissible). It does not, however, operate to exclude routine, non-adversarial observations incorporated in police records. The following cases illustrate this distinction.

F *Solomon v Shuell,* 435 Mich 104 (1990) (investigative police reports inadmissible):

Plaintiff filed a wrongful death action against the City of Detroit and four Detroit police officers after one of the officers shot and killed the plaintiff's husband. An issue on appeal was admission of four police reports into evidence under MRE 803(8).* Four Supreme Court Justices found the hearsay exception in MRE 803(8) inapplicable because the reports were not routine records made in a non-adversarial setting. Instead, these Justices found that the reports were investigative or evaluative reports of a similar nature to police reports that are excluded in criminal cases:

*The reports are described at Section 5.5(A).

> "A...rationale for the exclusion of police reports in criminal matters is that police reports in criminal cases are felt to be unreliable because of the adversarial nature of the confrontation between the police and the citizen in a criminal case....[T]he rulemakers were hesitant to allow the admission of a document which was the product of an adversarial relationship, both because the circumstances of production lessened the likelihood of reliability, and because the admission of such a document would not be fair to a criminal defendant.
>
> ...
>
> "We...hold that the police documents in this case were investigative reports outside the scope of MRE 803(8)(B). Clearly, they were not routine recordings of routine acts, nor were they created in a nonadversarial setting. However, this is not to say that all 'police' reports are generally outside the scope of MRE 803(8)(B). Police documents recording routine matters fall within the scope of the public records hearsay exception." 435 Mich at 143, 145 (opinion of Justice Boyle).

F *People v Stacy,* 193 Mich App 19, 32-35 (1992) (police records of routine matters made in non-adversarial settings held admissible):

A jury convicted the defendant of arson of a dwelling. At trial, the prosecution theorized that the defendant set the fire after fighting with James Davis, a person whom the defendant believed to be a resident of the dwelling. In an effort to show that someone other than the defendant may have set the fire, defense counsel elicited testimony from Davis that Davis had been involved in a fight with a man other than defendant, Roderick Rankin. In response, the prosecutor sought to establish that the police officer in charge of the arson investigation had explored this possibility and rejected it. The officer testified that he had interviewed Rankin and verified his alibi by checking a police report made by another officer. The information in the other officer's police report was gathered prior to the ignition of the fire, in a routine response to a call from the mother of a girl who wanted Rankin to leave her home. On appeal, the defendant asserted that the trial court erred in admitting the police report. The defendant based his assertion partly on MRE 803(8)(B), which in criminal cases excludes "matters observed by police officers" from the public records exception to the hearsay rule. The Court of Appeals affirmed the

defendant's conviction, holding that the police report was properly admitted under MRE 803(8):

> "The literal terms of MRE 803(8)(B) would appear to exclude, in all criminal cases, reports containing matters observed by police officers. FRE 803(8)(B) has not, however, been so broadly read....In *Solomon v Shuell*, 435 Mich 104 (1990), four justices of our Supreme Court appeared to suggest that the Court might, at some future date, find 'routine police reports made in a non-adversarial setting...admissible in criminal cases....' 435 Mich 144-145, n 9 (opinion of Justice Boyle; two other justices signed the opinion and Justice Griffin concurred in this part of Justice Boyle's opinion, 435 Mich 153). See also *United States v Hayes,* 861 F2d 1225, 1229 (CA 10, 1988) (citing cases for the proposition that 'the exclusionary provision of [Federal] Rule 803[8][B] was only intended to apply to observations made by law enforcement officials at the scene of a crime or while investigating a crime, and not to reports of routine matters made in non-adversarial settings')....We find this interpretation persuasive and applicable to the Michigan Rules of Evidence." 193 Mich App at 33.

The Court of Appeals further found that "no independent inquiry into reliability is required for confrontation clause purposes when MRE 803(8) is satisfied." 193 Mich App at 34.

A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805. See *In re Freiburger*, 153 Mich App 251, 259-260 (1986) (third party statements in police reports inadmissible hearsay), and *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 325-327 (1983) (eyewitnesses' statements in police accident report inadmissible hearsay).*

**Hewitt v Grand Trunk W R Co* is discussed in Section 5.5(A).

5.6 Statements Made for Purposes of Medical Treatment or Diagnosis

MRE 803(4) provides that, regardless of the declarant's availability as a witness, the rule against hearsay does not apply to statements made for purposes of medical treatment or diagnosis, which are defined as follows:

> "Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

In general, exceptions to the hearsay rule are justified by the belief that certain statements are both necessary and inherently trustworthy. The rationale for the exception in MRE 803(4) is: 1) the self-interested motivation to speak truthfully to treating physicians in order to receive proper medical care; and 2) the reasonable necessity of the statement to the patient's diagnosis and treatment. *Merrow v Bofferding*, 458 Mich 617, 629 (1998) (declarant's statement that his self-inflicted wound occurred after "a fight with his

girlfriend" was inadmissible under MRE 803(4) because it was not reasonably necessary for diagnosis and treatment).

A. Medical Relevance: Statements Identifying the Declarant's Assailant

*See also Section 5.10(E) (physician's duty to report injuries inflicted by violence).

Where an injury is caused by a criminal assailant, a victim's statements made to medical personnel are likely to identify the assailant as the "cause or external source."* In such cases, the question arises whether the assailant's identity is "reasonably necessary to...diagnosis and treatment." The following cases set forth some general principles for determining whether an assailant's identity is medically relevant, and illustrate how courts have applied these principles.

F *People v Meeboer (After Remand*), 439 Mich 310 (1992):

In these consolidated criminal sexual conduct cases involving children aged seven and under, the Supreme Court found that statements identifying an assailant may be necessary for the declarant's diagnosis and treatment, and thus admissible under MRE 803(4). The Court listed the following circumstances under which identification of an assailant may be necessary to obtain adequate medical care:

> "Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases....
>
> "Disclosure of the assailant's identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently experienced.
>
> "In addition to the medical aspect...the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child's household...[S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment....
>
> "A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for 'social disposition' of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.
>
> "Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the court finds the statement sufficiently reliable to support that exception's rationale." 439 Mich at 328-330.

F *People v Crump,* 216 Mich App 210, 212 (1996):

The defendant was convicted by a jury of first-degree criminal sexual conduct. On appeal, he asserted that the trial court erroneously admitted evidence of the complainant's statements to medical personnel. The Court of Appeals held that the statements were properly admitted under MRE 803(4). "The victim's statements to the medical personnel merely described the beatings and rape that led to her injuries....Further, the statements were cumulative evidence; the victim testified at trial to essentially the same facts as contained within the medical statements."

F *People v Van Tassel (On Remand),* 197 Mich App 653 (1992):

A 13-year-old complainant in a criminal sexual conduct case identified her father as her assailant during a health interview preceding a medical examination ordered by the probate court in a separate abuse/neglect proceeding. The Court of Appeals held that identification of the assailant was reasonably necessary to the complainant's medical diagnosis and treatment: "[T]reatment and removal from an abusive home environment was medically necessary for the child victim of incest." 197 Mich App at 661.

F *People v Creith,* 151 Mich App 217 (1986):

The defendant appealed from his conviction of manslaughter. The victim, who suffered from kidney failure, died after an alleged beating by the defendant. At trial, the court permitted the jury to hear the testimony of a nurse from the victim's dialysis center, and another nurse from a hospital emergency room. These nurses testified that the victim had described abdominal pain resulting from being punched in the abdomen. The Court of Appeals held that the trial court properly admitted the testimony of these witnesses under MRE 803(4). The Court found that the victim's statements were made for the sole purpose of seeking medical treatment and were reasonably necessary for that purpose.

F *People v Zysk,* 149 Mich App 452 (1986):

The defendant was convicted of first-degree criminal sexual conduct. The victim was his ex-girlfriend, who testified that he sexually assaulted her at knifepoint. At trial, a emergency room nurse who cared for the victim immediately after the assault testified regarding the victim's statement during her hospital examination. On appeal, the defendant argued that the trial court improperly applied MRE 803(4) to admit this testimony as an exception to the hearsay rule, because the testimony was not "reasonably pertinent" to either diagnosis or treatment. The Court of Appeals disagreed, holding that the trial court properly admitted the nurse's testimony under either the excited utterance or medical treatment exception:*

> "[N]othing in the record indicates that [the victim's] statement was made for any purpose other than treatment. Second, the witness testified that getting the victim's account is very important in the treatment of a rape victim. If any error occurred, it was in admitting that part of the statement which identified defendant as the attacker. However, since defendant's identification was not at issue, no prejudice to defendant resulted from the admission." 149 Mich App at 458.

*For a discussion of excited utterances, see Section 5.3(B)(2).

B. Trustworthiness: Child Declarant

For persons over ten years of age, a rebuttable presumption arises that they understand the need to tell medical personnel the truth. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662 (1992). See also *People v Crump*, 216 Mich App 210, 212 (1996) (adults are presumed to know the need to tell medical personnel the truth).

In cases involving children ten and younger, the trial court must inquire into the child's understanding of the need to be truthful with medical personnel. *People v Meeboer (After Remand*), 439 Mich 310, 326 (1992). In *Meeboer*, the Supreme Court held that an inquiry into the trustworthiness of a child's statement to a physician must "consider the totality of circumstances surrounding the declaration of the out-of-court statement." 439 Mich at 324. Factors to consider include: the age and maturity of the child; the manner in which the statements are elicited; the manner in which the statements are phrased; the use of terminology unexpected of a child of similar age; the circumstances surrounding the initiation of the examination; the timing of the examination in relation to the assault or trial; the type of examination; the relation of the declarant to the person identified as the assailant; the existence of or lack of motive to fabricate; and, corroborative evidence relating to the truth of the child's statement. 439 Mich 324-326.

For a hearsay exception for statements about sexual acts made by children under age ten, see MRE 803A.

C. Trustworthiness: Statements to Psychologists

In *People v LaLone*, 432 Mich 103 (1989), a criminal sexual conduct case, the Supreme Court overturned a trial court's decision to admit the testimony of a psychologist who treated the 14-year-old complainant. One reason given for the Supreme Court's decision was the difficulty in determining the trustworthiness of statements to a psychologist. 432 Mich at 109-110 (opinion of Justice Brickley). The Supreme Court revisited this question in *People v Meeboer, (After Remand*), 439 Mich 310 (1992), reiterating its belief that statements to psychologists may be less reliable than statements to physicians. 439 Mich at 325, 327. However, the Court in *Meeboer* also noted that "the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment." 439 Mich at 329. Accordingly, the Court stated that its decision in *LaLone* does not preclude statements made during "psychological treatment resulting from a medical diagnosis [of physical child abuse]." 439 Mich at 329.

5.7 "Catch-All" Hearsay Exceptions

MRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a).*

*Certain statements are by definition not hearsay; namely, prior statements of witnesses and admissions by party-opponents. MRE 801(d).

Except as provided in the Michigan Rules of Evidence, hearsay is not admissible. MRE 802. Detailed specific exceptions to this rule appear in MRE 803 (availability of declarant immaterial to admissibility), MRE 803A (child statement about sexual act), and MRE 804 (declarant must be unavailable as a witness). MRE 803(24) and 804(b)(7) also include general "catch-all" exceptions for out-of-court statements that do not fall within a specified exception to the hearsay rule. MRE 803(24) states the following exception:

> "A statement not specifically covered by [MRE 803(1)-(23)] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

MRE 804(b)(7) contains a substantially similar provision.

The Michigan Court of Appeals has considered the "catch-all" hearsay exceptions in the following cases:

F *People v Lee*, 243 Mich App 163, 170-181 (2000):

An 80-year-old victim of armed robbery made statements identifying the defendant as his assailant, but died before trial. The Court of Appeals found that testimony about the statements was properly admitted at trial under MRE 803(24). The Court noted that the statements had "a particularized trustworthiness." 243 Mich App at 179. They were consistent, coherent, lucid, voluntary, based on personal knowledge, and not the product of pressure or undue influence. Further, there was no evidence that the victim had a motive to fabricate or any bias against the defendant, or that the victim suffered from memory loss before the attack. The Court found no indication that cross-examination of the victim would have been of any utility, given his unwavering identification of his assailant, the absence of expectation that his testimony was expected to have varied from his prior identification, and the cognitive decline he suffered after being in the hospital for several days after the attack. 243 Mich App at 179-181.

F *People v Smith*, 243 Mich App 657, 688-690 (2000):

The trial court concluded that hearsay statements to the police and to the declarant's friend were trustworthy and admissible under the "catch-all" exception in MRE 804(b). The Court of Appeals found the trial court's conclusions erroneous. The Court found that the statements to the police lacked sufficient trustworthiness because at the time she made them, the declarant had been accused of a crime and had good reason to incriminate the defendant to avoid prosecution herself. Addressing the declarant's statement to her friend, the Court found that the prosecution wrongfully sought to establish its trustworthiness "by showing that the statement was proved true at a different time or place." Because there was no showing that the statement was trustworthy based on the circumstances surrounding its making, the Court of Appeals ruled that the trial court erred in finding that the statement was trustworthy.

F *People v Welch*, 226 Mich App 461, 464-468 (1997):

A defendant charged with second-degree murder sought to introduce an eyewitness's statement contained in a police report. The eyewitness's statement related the victim's alleged statement that she was going to kill herself, after she was assaulted and before she jumped off a bridge to her death. The Court of Appeals found no abuse of discretion in the trial court's determination that the eyewitness's statement was not sufficiently trustworthy to be admitted under MRE 803(24). The trial court found insufficient evidence that the eyewitness had actually heard the victim's statement, and the Court of Appeals noted that cross-examination of the eyewitness "would have been of more than marginal utility."

5.8 Expert Testimony on Battering and Its Effects

*For more on expert testimony, see *Managing a Trial Under the Controlled Substances Act,* ch 13 (MJI, 1995).

This section will briefly outline the criteria for admitting expert testimony on battering and its effects into evidence at trial, and digest illustrative appellate cases.*

A. Criteria for Admitting Expert Testimony

Michigan Rules of Evidence 702 to 707 govern the use of expert testimony at trial. MRE 702 provides the standard for admissibility of expert testimony:

> "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In *People* v *Beckley,* 434 Mich 691, 711 (1990), the Supreme Court articulated the following three-part test for admissibility of expert testimony under MRE 702:

F The expert must be qualified.

There are two basic types of expert witnesses — those with academic training, and those with practical experience. Witnesses with either background may be qualified to testify if they demonstrate understanding of the particular fact situation. *People v Boyd*, 65 Mich App 11, 14-15 (1975). Whether a witness's expertise is as great as that of others in the field is relevant to the weight rather than the admissibility of the testimony and is a question for the jury. *People v Gambrell*, 429 Mich 401, 408 (1987).* In cases involving sexual abuse of children, expert testimony has been presented by physicians, crisis counselors, social workers, police officers, and psychologists. See *People v Beckley*, *supra*, 434 Mich at 711, and cases cited therein.

*For a jury instruction on the weight that a juror should give to expert testimony, see CJI2d 5.10 and 20.29 (for child sexual abuse cases).

F The evidence must give the trier of fact a better understanding of the evidence or assist in determining a fact in issue.

Expert testimony must be helpful and relevant to explain matters not readily comprehensible to an average juror. In *People v Christel*, 449 Mich 578, 591 (1995), the Michigan Supreme Court held that in an appropriate case, an expert may explain the generalities or characteristics of the battered woman syndrome, so long as the testimony is limited to a description of the uniqueness of a specific behavior brought out at trial. Such behavior may include prolonged endurance of abuse, attempts to hide or minimize abuse, delays in reporting abuse, or recanting allegations of abuse.* 449 Mich at 580, 592-593. The expert's testimony must be limited to generalities, however. An expert may not opine that the complainant in a case is a battered woman, that the defendant is a batterer, or that the defendant is guilty of the crime charged. Moreover, an expert may not comment on whether the complainant is being truthful. 449 Mich at 591.

*See Section 1.6 on victims' coping and survival strategies.

See also *People v Wilson,* 194 Mich App 599, 605 (1992) (expert testifying about battered spouse syndrome may render an opinion only about the syndrome and its symptoms, not whether an individual suffers from the syndrome or acted pursuant to it). *Wilson* applied the reasoning found in *People v Beckley*, *supra*, 434 Mich at 725-728, in which the Supreme Court reached a similar conclusion regarding expert testimony about the rape trauma syndrome in a child sexual abuse case.

F The evidence must be from a recognized discipline.

In *People v Christel, supra,* 449 Mich at 592, the Supreme Court acknowledged that battered woman syndrome evidence is from a recognized discipline.

In general, expert testimony based on scientific principles or techniques is subject to the "*Davis/Frye* rule," which is based on *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923) and *People v Davis*, 343 Mich 348 (1955). Under this rule, testimony based on a novel scientific principle or technique may be admitted into evidence only after the trial court has held a hearing to determine its reliability as a threshold matter. The *Davis/Frye* rule has not been applied to certain evidence gained from the behavioral sciences,

however. See *People v Beckley*, *supra*, 434 Mich at 718-721 (opinion of Justice Brickley), in which a plurality of Michigan Supreme Court Justices agreed that the *Davis/Frye* rule should not be applied to rape trauma syndrome evidence offered in a child sexual abuse case, and *People v Peterson,* 450 Mich 349, 369 (1995), where the Supreme Court reaffirmed this holding for cases where syndrome evidence is "merely offered to explain certain behavior."

If the court determines that the expert testimony meets the foregoing three-part test, it must next determine whether the probative value of the expert testimony outweighs the danger of unfair prejudice. MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, on request, the trial judge may deem a limiting instruction an appropriate alternative to excluding the evidence. *People v Christel, supra*, 449 Mich at 587.

> **Note:** In *Christel*, the Supreme Court stated that the danger of unfair prejudice was dispelled by the limitations the Court imposed on the scope of an expert's testimony regarding battered woman syndrome. 449 Mich at 591, n 24.

B. Michigan Cases Addressing Evidence of Battering and Its Effects

For a 50-state survey of statutory and case law, see Parrish, *Trend Analysis: Expert Testimony on Battering & Its Effects in Criminal Cases,* in Validity & Use of Evidence Concerning Battering & Its Effects in Criminal Trials (Nat'l Inst of Justice, 1996).

Expert testimony on battering and its effects may be used by either the prosecutor or defendant in criminal cases.* The Michigan appellate courts have considered the admissibility of expert testimony on battering and its effects in the following cases.

F *People v Christel,* 449 Mich 578 (1995) (prosecutor seeks to explain the behavior of the complaining witness):

The defendant in *Christel* was convicted of first-degree criminal sexual conduct against his former intimate partner. On appeal, he asserted that the trial court erred in admitting testimony about the battered woman syndrome from a clinical psychologist trained in the field of domestic violence. The prosecution offered this testimony at trial to help evaluate the complainant's credibility, and to rebut defendant's claims that the complainant was a liar, a self-mutilator, and an embezzler. The psychologist testified that women often remain in an intimate relationship even though abuse is occurring. As the abuse escalates over time, they may deny, repress, or minimize it rather than be outraged. 449 Mich at 584-585. The Supreme Court concluded that the trial court erred in admitting this testimony because the requisite factual underpinnings for its introduction were lacking. The Court found that the complainant had ended her relationship with the defendant one month prior to the assault, and did not try to hide or deny the assault. Moreover, she did not delay reporting the crime, but immediately sought medical attention with accompanying discussions with police. The complainant also never recanted her testimony that the assault occurred. Under these

circumstances, the expert testimony was not relevant because the complainant's actions were not characteristic of battered woman syndrome. 449 Mich at 597-598.

F *People v Daoust*, 228 Mich App 1 (1998) (prosecutor seeks to explain the behavior of a witness to an alleged crime):

The defendant was charged with two counts of first-degree child abuse based on injuries to the head and hand of his girlfriend's daughter. In addition to these injuries, the child suffered numerous bruises. During the initial stages of the investigation, the child's mother denied involvement with the defendant, and admitted responsibility for some of the bruises on the child's body. However, at defendant's trial she testified that the injuries to the child's head and hand were suffered while the child was in the care of the defendant. She further stated that the defendant had threatened to harm her and the child if she sought medical attention for the child's injuries, and that she had attempted to deflect the blame for the injuries away from the defendant because she was afraid of him. 228 Mich App at 4-5.

A jury convicted defendant of second-degree child abuse based on the injury to the child's hand. On appeal, defendant challenged the trial court's decision to admit expert testimony regarding the battered woman syndrome, asserting that the testimony was not relevant and helpful to the trier of fact. The testimony, given by the executive director of a domestic violence, sexual assault, and child abuse center, described the dynamics of relationships involving women who live under threat of physical or sexual violence. The witness explained that certain types of control mechanisms apart from physical violence are often present in such relationships, and that a woman could fall into a pattern of abuse without ever being hit. She further stated that it was quite common for a woman in this type of relationship to lie in order to protect her partner. Thus, she opined that a woman in this situation might falsely take the blame for abusing her own child because she may fear that exposing the truth will result in even greater abuse. 228 Mich App at 10-11.

The Court of Appeals upheld the trial court's decision to admit the expert testimony, finding that the circumstances described by the expert corresponded to circumstances described by the child's mother. Although the child's mother testified that defendant never actually hit her, she also stated that the defendant: 1) verbally abused her; 2) threatened to harm her and her child; 3) paid close attention to her whereabouts, discouraging her from seeing her friends; 4) controlled her access to her own money; 5) threatened to beat up the child's baby-sitter for making reports to Protective Services about bruises on the child's body; and, 6) forced her to perform oral sex on him against her will. The mother also stated that she was afraid to leave the defendant because of his threats. In light of the mother's testimony, the Court of Appeals found that the expert testimony was "relevant and helpful to explain why [the mother] might have initially sought to deflect the blame for her daughter's injuries away from defendant while knowing he was responsible." 228 Mich App at 11.

F *People v Wilson,* 194 Mich App 599 (1992) (defendant seeks to prove that she committed murder in self defense):

The defendant admitted to shooting her husband while he slept, claiming that she acted in self defense. Prior to her trial on murder charges, defendant moved for admission of expert testimony regarding the "battered spouse syndrome" (BSS). She asserted that this testimony was essential to establish that she acted in self defense following 48 hours of abuse and death threats and years of battery. 194 Mich App at 600-601. The people appealed from the trial court's interlocutory order granting defendant's motion. The Court of Appeals held that the proffered testimony was relevant and helpful because it would give the jury a better understanding of whether defendant reasonably believed her life was in danger, and whether she could have left her husband. 194 Mich App at 604. Having so held, however, the Court of Appeals limited the parameters of the testimony. Citing *People v Beckley*, 434 Mich 691,726-727, 729 (1990), the Court of Appeals stated:

> "Because an expert regarding the child sexual abuse accommodation syndrome is an expert with regard to the syndrome and not the victim, it is inappropriate for that expert to render an opinion regarding whether the victim actually suffers from the syndrome. However, the Court in *Beckley* held the expert could render an opinion that the victim's behavior is common to the class of child abuse victims as long as the symptoms are already established in evidence. The expert may not introduce new facts about the victim unless those facts are properly admitted under a rule other than MRE 702....We believe the same limitations should apply to experts who testify about the BSS. As with the child abuse syndrome, the BSS expert is an expert with regard to the syndrome and not the particular defendant. Thus, the expert is qualified only to render an opinion regarding the 'syndrome' and the symptoms that manifest it, not whether the individual defendant suffers from the syndrome or acted pursuant to it." 194 Mich App at 605. [Citation omitted.]

Under the foregoing guidelines, the defendant's expert was not allowed to offer an opinion whether the defendant suffered from BSS, or whether her act was the result of the syndrome. The expert was further restricted from testifying whether the defendant's allegations of battery were truthful, this being an issue of credibility for the jury.

> **Note:** To establish self-defense, a defendant must honestly and reasonably believe that his or her life is in imminent danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502 (1990).

F *People v Moseler,* 202 Mich App 296 (1993) (defendant seeks to prove that the charged crime was committed under duress):

On appeal from her conviction of vehicular manslaughter, the defendant claimed that she had been driving recklessly to escape her boyfriend. On the date of the accident that led to the charges, defendant argued with her boyfriend, and inadvertently backed her car into his car. He became angry and threatened to "kick her ass." She drove away at a high rate of speed, with her boyfriend in pursuit. She ran four red lights and struck another vehicle, killing the driver of this vehicle. Defendant stated that she had been beaten by her boyfriend in the past, and feared that he would carry out his threat to "kick her ass." 202 Mich App 297. She further asserted

that she was denied effective assistance of counsel because her attorney did not introduce evidence of the "battered women's syndrome" to show that her actions were the result of duress. The Court of Appeals rejected defendant's argument as follows:

> "[Defendant] was the one who drank six beers before confronting [her boyfriend], she was the one who backed her car into his car, and she was the one who elected to drive in excess of the speed limit and to run red lights rather than adopt any of the other options available to her. On the basis of the existing record, we do not find any error in counsel's trial strategy that prejudiced defendant's case." 202 Mich App at 299.

The Court of Appeals further rejected defendant's argument that the trial court erroneously failed to instruct the jury on duress, stating that duress is not a valid defense to homicide. *Id.*

5.9 Privileges Arising from a Marital Relationship

This section addresses the two privileges that arise from a marital relationship under MCL 600.2162; MSA 27A.2162:

- MCL 600.2162(1)-(2); MSA 27A.2162(1)-(2) establish **spousal privileges** that limit the circumstances under which one spouse may "be examined as a witness" for or against the other spouse. This privilege is only applicable when the witness spouse and the non-witness spouse are married at the time of the examination. See *People v Vermeulen*, 432 Mich 32, 35 (1989).
- MCL 600.2162(4)-(7); MSA 27A.2162(4)-(7) establish **confidential communication privileges** limiting the circumstances under which an individual may "be examined" as to communications that occurred between the individual and his or her spouse during their marriage. This privilege applies whether the testimony is sought during or after the marriage, as long as the communication occurred during the marriage. See *People v Vermeulen, supra.*

In cases applying MCL 600.2162; MSA 27A.2162, the Michigan Supreme Court has narrowly construed the provisions that establish the privileges, and broadly construed the exceptions to the privileges. *People v Warren*, 462 Mich 415, 427 (2000). Accordingly, the Court has construed the language "be examined" in the statute to connote a narrow testimonial privilege, i.e., a privilege against being questioned as a sworn witness. The introduction of a spouse's statement through other means is thus not precluded. See *People v Fisher*, 442 Mich 560, 575-576 (1993) (confidential communication privilege did not preclude the trial court from considering a wife's statements about her husband to a police officer, which were contained in a presentence report), and *People v Williams*, 181 Mich App 551, 554 (1989) (spousal privilege inapplicable to a statement by the defendant's husband to a 911 operator, which the prosecutor sought to introduce by way of the operator's testimony at trial). See also *People v Smith*, 243 Mich App 657, 681-690 (2000) (prosecutor conceded that the defendant's wife could not be called to testify due to the marital privileges, but sought to introduce her statements under a

hearsay exception; the effect of admitting hearsay testimony on the marital privileges was not decided by the Court of Appeals, however.)

> **Note:** The cases cited above were decided before amendments to MCL 600.2162; MSA 27A.2162 took effect on October 1, 2000, and May 29, 2001. However, the amendments did not change the basic nature of the spousal and confidential communication privileges as described above.

A. Spousal Privilege

Pursuant to statutory amendments effective October 1, 2000 and May 29, 2001,* the person in whom the spousal privilege vests depends on the nature of the proceeding:

*2000 PA 182, and 2001 PA 11. Prior to these enactments, the non-witness spouse held the spousal privilege in all proceedings.

- In a civil action or administrative proceeding the *non-witness* spouse holds the privilege, subject to certain statutory exceptions that will be addressed below. MCL 600.2162(1); MSA 27A.2162(1) states that "a husband shall not be examined as a witness for or against his wife without her consent, or a wife for or against her husband without his consent."
- In a criminal prosecution, the *witness* spouse holds the privilege, subject to certain statutory exceptions addressed below. MCL 600.2162(2); MSA 27A.2162(2) provides that "a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent."

*The 2000-2001 amendments to the statute do not appear to have altered these characteristics.

The spousal privilege may only be invoked when the witness spouse and the non-witness spouse are legally married at the time of trial. The spousal privilege precludes all testimony, regardless of whether the events at issue occurred before or during the marriage. *People v Warren*, 462 Mich 415, 422 (2000).*

The spousal privilege does not apply in several situations that may be of particular importance in cases involving allegations of domestic violence:

- Suits for divorce, separate maintenance, or annulment. MCL 600.2162(3)(a); MSA 27A.2162(3)(a).
- Prosecutions for crimes committed against a child of either or both spouses, or crimes committed against individuals younger than age 18. MCL 600.2162(3)(c); MSA 27A.2162(3)(c).
- Actions growing "out of a personal wrong or injury done by one [spouse] to the other or [growing] out of the refusal or neglect to furnish the spouse or children with suitable support." MCL 600.2162(3)(d); MSA 27A.2162(3)(d).
- Cases of desertion or abandonment. MCL 600.2162(3)(e); MSA 27A.2162(3)(e).

In addition, the privilege also does not apply in prosecutions for bigamy, and in certain property disputes between the spouses. MCL 600.2162(3)(b),(f); MSA 27A.2162(3)(b),(f).

In the following cases, Michigan appellate courts addressed the scope of the "personal wrong or injury" exception to the spousal privilege. These cases are decided under the statute that preceded the current version of MCL 600.2162(3)(d); MSA 27A.2162(3)(d). However, the "personal wrong or injury" provision in the current version of the statute does not differ significantly from its predecessor.

F *People v Warren,* 462 Mich 415 (2000):

After an argument in the family's apartment, the defendant threatened his wife and began to tie her up. He was interrupted, however, when his sister-in-law arrived. She took defendant's wife and children to her home. Later, defendant's wife and children went with the wife's mother to the mother's home. Defendant also went to his mother-in-law's home, arriving there before the other family members. He broke into the home, and hid in the basement. Defendant testified at trial that he encountered his mother-in-law upon her arrival at her home. A struggle ensued, during which the mother-in-law fell bleeding to the floor. Defendant's wife testified that he beat and sexually assaulted her after the encounter with her mother. He then tied her hands and feet, gagged her mouth, and drove away in her mother's car. Defendant's wife eventually escaped to a neighbor's house. Her mother was found dead in the basement.

Defendant was convicted of first-degree felony murder, two counts of first-degree criminal sexual conduct, assault and battery, kidnapping, and the unlawful driving away of an automobile. On appeal, he asserted the spousal privilege in MCL 600.2162; MSA 27A.2162, arguing that the trial court abused its discretion in allowing his wife to testify regarding the charges of murder, home invasion, and UDAA. Defendant argued that these crimes fell outside the scope of the personal wrong exception. The Supreme Court upheld the trial court's decision to allow defendant's wife to testify about all the crimes of which defendant was convicted. First, the Court approved of a "temporal sequence test" articulated in *People v Love*, 425 Mich 691, 709 (1986) (opinion of Chief Justice Williams). Under that test, a criminal action can "grow out of" a personal wrong or injury only if the testifying spouse was wronged prior to that action. 462 Mich at 425. Additionally, the Court expressed the following criteria:

> "[W]e read the exception to allow a victim-spouse to testify about a persecuting [sic] spouse's precedent criminal acts where (1) the underlying goal or purpose of the persecuting spouse is to cause the victim-spouse to suffer personal wrong or injury, (2) the earlier criminal acts are committed in furtherance of that goal, and (3) the personal wrong or injury against the spouse is ultimately completed or 'done.'
>
> "Thus, where a persecuting spouse's criminal activities have roots in acts ultimately committed against the victim-spouse, those preparatory crimes constitute 'cause[s] of action that grow[] out of a personal wrong or injury done by one to the other....' MCL 600.2162(1)(d); MSA 27A.2162(1)(d). This is because the underlying intent, the 'seed' from which the other criminal acts grew, was the personal wrong or injury done to the spouse." 462 Mich at 429.

Applying this test to the facts, the Supreme Court found that "Brian Warren's purpose in embarking on his crime spree was to commit a personal wrong against or injury to his wife. He achieved this objective and all the crimes that he perpetrated grew out of it." 462 Mich 431-432. After initially assaulting his wife at their home, the defendant broke into his mother-in-law's home "in order to have access to his wife." 462 Mich at 431. He assaulted, battered, sexually assaulted, and kidnapped his wife there. The crime of felony murder, based on the underlying felony of home invasion, grew out of those personal wrongs to his wife. He then took his mother-in-law's car after binding his wife in order to continue her secret confinement. The UDAA thus grew out of the kidnapping of his wife and came within the personal wrong exception to the spousal privilege. *Id.*

F *People v Vann*, 448 Mich 47 (1995):

Defendant was convicted of assaulting another man with a gun. At trial, his estranged wife testified that she was leaving the victim's house when she heard the defendant call and approach her. She ran back into the victim's house, where she heard a struggle at the door, breaking glass, and gun shots. One bullet struck her on the shoulder, but did not injure her. On appeal, defendant asserted that his wife's testimony violated the spousal privilege because the crimes charged were not committed against his wife. The Supreme Court disagreed, upholding the trial court's decision to allow the wife to testify. The Court stated:

> "[T]he prosecution's evidence indicated that there was an assault on the defendant's wife, and that it occurred contemporaneously with the assault on the third party....[T]he offense committed against the third party...did 'grow out of' the personal wrong or injury done by the defendant to his wife." 448 Mich at 52.

F *People v Eberhardt,* 205 Mich App 587 (1994):

Defendant was convicted of larceny from a person and uttering and publishing after stealing his wife's AFDC check from a letter carrier, forging her signature on it, and cashing it at a supermarket. At trial, defendant's wife identified the endorsement on the check as her name signed by defendant. On appeal, defendant contended that the trial court should have precluded his wife's testimony under the spousal privilege rule. The Court of Appeals upheld the trial court's decision to admit the testimony under the personal wrong or injury exception to the privilege:

> "[T]he grocery store was not the only victim of the crime of uttering and publishing. We believe that the personal wrong or injury exception applies to this case because defendant's action...constituted a personal wrong against her by depriving her and her children of a benefit to which they were legally entitled." 205 Mich App at 590.

F *People v Pohl,* 202 Mich App 203, 207-208 (1993), remanded on other grounds 445 Mich 915 (1994):

In this case, the Court of Appeals held that the destruction of personal property can constitute a personal wrong or injury. The Court applied the personal wrong exception to the spousal privilege where the defendant broke into the marital home in violation of a restraining order, damaged property, and removed personal property that had been in the possession of his wife.

B. Confidential Communications Privilege

MCL 600.2162(4)-(7); MSA 27A.2162(4)-(7) create a privilege for confidential communications made between spouses during a marriage. The extent of this privilege is determined according to the nature of the proceeding:

In civil actions or administrative proceedings generally, "a married person or a person who has been married previously shall not be examined...as to any communication made between that person and his or her spouse or former spouse during the marriage." MCL 600.2162(4); MSA 27A.2162(4). However, a married or previously-married person may *with his or her consent* be examined as to communications during the marriage regarding the matters described in MCL 600.2162(3); MSA 27A.2162(3). These matters are the same as the exceptions to the spousal privilege listed in Section 5.9(A). MCL 600.2162(5)-(6); MSA 27A.2162(5)-(6).

In criminal prosecutions generally, "a married person or a person who has been married previously shall not be examined...as to any communication made between that person and his or her spouse or former spouse during the marriage *without the consent of the person to be examined.*" [Emphasis added.] However, this privilege does not apply to the matters described in MCL 600.2162(3); MSA 27A.2162(3). These matters are the same as the exceptions to the spousal privilege listed in Section 5.9(A). MCL 600.2162(7); MSA 27A.2162(7).

The confidential communications privilege may be invoked during the marriage or after it has ended, as long as the communication at issue was made during the marriage.* In deciding whether the communication was made during the marriage, the court may not inquire into the viability of the marriage at the time of the communication. *People v Vermeulen,* 432 Mich 32, 37-38 (1989). In addition, the court must extend the communication privilege to a marriage properly contracted under the laws of another jurisdiction, even though Michigan law does not recognize that form of marriage. *People v Schmidt*, 228 Mich App 463 (1998) (extending privilege to communications between spouses married at common law under the laws of Alabama).

*The 2000-2001 amendments to the statute do not appear to have altered these characteristics.

The Michigan appellate courts have held that the statutory language "any communication made...during the marriage" refers only to "confidential" communications between the spouses. The following cases address the nature of "confidential" communications:*

*These cases are decided under the statute that preceded current MCL 600.2162(7); MSA 27A.2162(7). However, the current version of the statute contains language substantially similar to that at issue in the cases.

F *People v Vermeulen,* 432 Mich 32 (1989):

Defendant filed for divorce from his first wife on October 28, 1985. He married his second wife on November 11, 1985, before his divorce was final. His second wife was killed on December 26, 1985. The judgment of divorce from his first wife was entered on February 7, 1986. Defendant was charged with murdering his second wife. Approximately one week before her death, defendant had spoken to his first wife and allegedly

stated that he would kill his second wife if she left him. The prosecutor sought at trial to have the first wife testify as to this conversation, to refute the defendant's claim that his second wife's death was an accident. The Supreme Court held that the first wife's testimony was barred by the spousal communication privilege:

> "Although the statute speaks of 'any communication,' it is well-established in this state...that only confidential communications are protected by the communication privilege. It has been said that 'a variety of factors, including the nature of the message or the circumstances under which it was delivered, may serve to rebut a claim that confidentiality was intended'....The nature of the marriage relationship immediately preceding or immediately after the communication is not, however, a circumstance respecting the communication that may be considered in determining whether it is confidential....The nature and circumstances of the communication in the instant case do not rebut a claim that the communication was confidential." 432 Mich at 39-40.

F *People v Zabijak*, 285 Mich 164 (1938):

Defendant went to the home of his estranged wife with a gun and threatened to kill her and her baby. After shooting and killing the baby and shooting his wife through the mouth, he said that he was going to kill her mother. He then went to his mother-in-law's house and killed her. He was convicted of murdering his mother-in-law. At trial, defense counsel objected to the admission of the wife's testimony concerning defendant's threatening statements made to her at the time of the shootings. The Supreme Court held that defendant's statements to his wife were not confidential communications subject to privilege:

> "[Defendant's communications to his wife] were not in the nature of an admission or confession or an act of which she otherwise might not be cognizant. Nothing was revealed in consequence of the privacy of the marriage relation. The statements testified to were in the nature of threats. They were made after the door of the house was closed and locked, but this was done...not to secure secrecy with regard to the statements made, but to prevent the escape of the wife and child to safety, and to insure that there would be no interference from others in the carrying out by the defendant of his murderous intentions." 285 Mich at 182.

In *People v Vermeulen, supra,* 432 Mich at 40, the Supreme Court explained that *Zabijak* was decided based on the nature of the communication and the circumstances in which it was delivered, as follows: "The statement in 'the nature of threats' in *Zabijak* concerned a contemplated assault that was an aspect of the same felonious transaction in which, and was uttered immediately after, the witness spouse had been shot and their baby killed." The *Vermeulen* Court rejected the notion that a threat against a third person communicated to a spouse would fall per se outside the definition of a confidential communication. 432 Mich at 40, n 9.

F *People v Byrd,* 207 Mich App 599 (1994):

Defendant was convicted of delivery of marijuana. On appeal, she challenged the trial court's denial of her motion to quash the information based on entrapment. According to the defendant, her estranged husband,

acting as a confidential police agent, coerced her to deliver marijuana to an undercover police officer using threats and promises not to contest their divorce. At the entrapment hearing, the defendant's husband successfully invoked the marital communication privilege through the prosecutor, asserting that his conversations with the defendant were confidential and could not be admitted through the defendant's testimony. Because the defendant could not present her account of her conversations with her husband to support her motion to quash, the motion was denied. The Court of Appeals held that the defendant should have been permitted to testify at the entrapment hearing:

> "A party may rebut a claim of confidential communication by showing, among other things, that the communication concerned 'business matters transacted by one spouse as agent for the other.' [Citations omitted.]
>
> "Defendant alleged that her estranged husband called her repeatedly, pleading and making threats, and thereby induced her to act criminally. Then, the undercover officer came to defendant's house, posing as the buyer...and obtained the marijuana pursuant to the husband's prearrangement. Accepting defendant's allegations as true, it is reasonable to infer that defendant acted as an agent for her husband.
>
> "Moreover, it is equally reasonable to infer that the conversations between defendant and her husband were not intended by either party to be confidential. The sequence of events leading up to the first sale of marijuana makes it probable that defendant revealed to the officer at least some portions of the conversations with her husband, for example, the fact that she had spoken with her husband, that she knew the officer was coming, and that her husband told her what to arrange. It is even more likely that defendant's husband revealed portions of the conversation to the officer." 207 Mich App at 602-603.

5.10 Privileged Communications with Medical or Mental Health Service Providers

The Michigan Legislature has enacted a number of statutes that limit the use of communications with medical or mental health service providers as evidence in civil or criminal trials. Sections 5.10(A)-(F) contain brief descriptions of these statutory privileges as they apply to the service providers who are likely to be consulted by the parties to relationships involving domestic violence. Following the descriptions of the communications subject to privilege, Sections 5.10(G)-(H) will address the exceptions to these privileges that apply in cases involving suspected child abuse or neglect, and in cases where exceptions are necessary to protect a defendant's due process rights.

> **Note:** Further information about privileged communications can be found in Hagen and Rattet, *Communications and Violence Against Women: Michigan Law on Privilege, Confidentiality, and Mandatory Reporting,* 17 T M Cooley L Rev 183 (2000). The discoverability of crime victim statements to "victim-witness assistants" or "victim-witness advocates" acting as liaisons between crime victims and prosecutors is addressed in Miller, Crime Victim Rights Manual, Section

5.7 (MJI, 2001). On this topic see also *Commonwealth v Liang*, 747 NE2d 112 (Mass, 2001) (work of victim-witness advocates employed by prosecutor was subject to the same legal discovery obligations as that of prosecutors).

A. Sexual Assault or Domestic Violence Counselors

Communications between a domestic violence victim and a sexual assault or domestic violence counselor are protected under MCL 600.2157a(2); MSA 27A.2157(1)(2), as follows:

> "[A] confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim."

The scope of this victim/counselor privilege is determined by MCL 600.2157a(1); MSA 27A.2157(1)(1), which provides the following definitions:

> "(a) 'Confidential communication' means information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim....
>
> "(c) 'Sexual assault' means assault with intent to commit criminal sexual conduct.
>
> "(d) 'Sexual assault or domestic violence counselor' means a person who is employed at or who volunteers service at a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling, or other assistance to victims of sexual assault or domestic violence and their families.
>
> "(e) 'Sexual assault or domestic violence crisis center' means an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence and their families through crisis intervention and counseling.
>
> "(f) 'Victim' means a person who was or who alleges to have been the subject of a sexual assault or of domestic violence."

MCL 600.2157a(1)(b); MSA 27A.2157(1)(1)(b) defines "domestic violence" with reference to MCL 400.1501(d); MSA 16.611(1)(d). That statute is contained in the act creating the Michigan Domestic Violence Prevention and Treatment Board, and defines "domestic violence" as follows:

> "(d) 'Domestic violence' means the occurrence of any of the following acts by a person that is not an act of self-defense:
>
> "(i) Causing or attempting to cause physical or mental harm to a family or household member.

> "(ii) Placing a family or household member in fear of physical or mental harm.
>
> "(iii) causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> "(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

MCL 400.1501(e); MSA 16.611(1)(e) defines "family or household member" to include any of the following:

> "(i) A spouse or former spouse.
>
> "(ii) An individual with whom the person resides or has resided.
>
> "(iii) An individual with whom the person has or has had a dating relationship.
>
> "(iv) An individual with whom the person is or has engaged in a sexual relationship.
>
> "(v) An individual to whom the person is related or was formerly related by marriage.
>
> "(vi) An individual with whom the person has a child in common.
>
> "(vii) The minor child of an individual described in subparagraphs (i) to (vi)."

"Dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 400.1501(b); MSA 16.611(1)(b).

The privilege created in MCL 600.2157a; MSA 27A.2157(1) does not apply to information that must be disclosed under the Child Protection Law, which is discussed in Section 5.10(G) below. MCL 600.2157a(2); MSA 27A.2157(1)(2).

The privilege created in MCL 600.2157a; MSA 27A.2157(1) renders victim/counselor communications inadmissible as evidence absent a victim's written consent. The Michigan Attorney General has opined that the statute does *not* prohibit other non-evidentiary uses of such communications. Accordingly, the Attorney General has concluded that the statute does not prohibit a domestic violence counselor from disclosing an alleged victim's whereabouts to law enforcement authorities. A domestic violence shelter or other crisis center is free to adopt whatever policies it wishes regarding the voluntary disclosure of such information. OAG, 1997, No 6953 (September 16, 1997).

> **Note:** If a sexual assault or domestic violence counselor is also licensed as a social worker or psychologist, other privileges (discussed below) may apply in addition to the privilege created in MCL 600.2157a; MSA 27A.2157(1).

B. Social Workers

MCL 333.18513; MSA 14.15(18513) protects communications between a social worker and a client. This privilege does not apply to:

- Disclosures required for internal supervision of the social worker MCL 333.18513(2)(a); MSA 14.15(18513)(2)(a).
- Disclosures made under the duty to warn third parties of threats of physical violence as set forth in MCL 330.1946; MSA 14.800(946). MCL 333.18513(4); MSA 14.15(18513)(4).
- Disclosures made after the client (or a person authorized to act on the client's behalf) has waived the privilege. MCL 333.18513(2)(b); MSA 14.15(18513)(2)(b).

The social worker/client privilege is also abrogated with respect to information that must be disclosed under the Child Protection Law, which is discussed in Section 5.10(G).

C. Psychologists or Psychiatrists

*Regarding psychiatrists, see also Section 5.10(E), which addresses privileged communications with physicians.

With certain exceptions, the Mental Health Code shields communications made to a psychiatrist* or psychologist from disclosure in "civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege." The fact of treatment is also privileged from disclosure. MCL 330.1750(1) and (3); MSA 14.800(750)(1) and (3). See also MCL 333.18237; MSA 14.15(18237), providing that without client consent, a psychologist or an individual under his or her supervision "cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services."

Many of the exceptions to this privilege arise in the context of civil or administrative proceedings that are beyond the scope of this benchbook. In a criminal context, the following exceptions are pertinent:

- Upon request, a privileged communication shall be disclosed in a criminal action arising from the treatment of the patient against the mental health professional for malpractice. MCL 330.1750(2)(d); MSA 14.800(750)(2)(d).
- Upon request, a privileged communication shall be disclosed if it was made during an examination ordered by a court, if the patient was informed prior to the examination that the communication would not be privileged. Under these circumstances the communication may only be used with respect to the particular purpose for which the examination was ordered. MCL 330.1750(2)(e); MSA 14.800(750)(2)(e).
- A privileged communication may be disclosed pursuant to MCL 330.1946; MSA 14.800(946), which sets forth a duty to warn third parties of threats of physical violence. MCL 330.1750(4); MSA 14.800(750)(4).

F The privilege is abrogated with respect to information that must be disclosed under the Child Protection Law, which is discussed in Section 5.10(G).

See also MCL 330.1748; MSA 14.800(748) on the confidentiality of records of recipients of mental health services.

D. Records Kept Pursuant to the Juvenile Diversion Program

MCL 722.828(1); MSA 25.243(58)(1) provides that records kept under the Juvenile Diversion Act "shall be open only by order of the court to persons having a legitimate interest."* MCL 722.828(2); MSA 25.243(58)(2) further explains that "a record required to be kept under this act shall be open to a law enforcement agency or court intake worker for only the purpose of deciding whether to divert a minor." Persons (including law enforcement or court officials) who use diversion records for any other purpose are subject to misdemeanor penalties. MCL 722.829; MSA 25.243(59)

*For more discussion of juvenile diversion records, see Miller, *Juvenile Justice Benchbook*, Section 4.8 (MJI, 1998). Information about confidentiality of records in juvenile delinquency cases also appears at Section 4.16(B).

In *People v Stanaway*, 446 Mich 643, 660-661 (1994), the Michigan Supreme Court stated that the "legitimate interest" in these records is arguably limited to situations in which a decision is being made whether to divert a minor. In light of this limited purpose, the Court in *Stanaway* held that records subject to these statutes were privileged from pretrial discovery in a criminal proceeding, except to the extent required to protect the defendant's due process rights. 446 Mich at 678-680. More discussion of *Stanaway* appears at Section 5.10(H).

E. Physicians

MCL 600.2157; MSA 27A.2157 provides in pertinent part:

> "Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon."

This privilege prohibits disclosure of verbal communications of confidential information to a physician, as well as "any information" that is "acquired" by a physician in the course of treating a patient, as long as the information is necessary to treat the patient. The privilege thus applies even if the patient is unconscious at the time the information is acquired. *People v Childs*, 243 Mich App 360, 368 (2000).

Under MCL 750.411(2); MSA 28.643(2), physicians and surgeons who are in charge of or caring for a person "suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence," must immediately report the following to local law enforcement officials, both by telephone and in writing:*

*See also MCL 750.411(1); MSA 28.643(1) on these reporting requirements.

- The name and residence of the wounded person, if know.
- The whereabouts of the wounded person.
- The cause of the injury.
- The character and extent of the injury.

This duty also extends to "[a] person, firm, or corporation conducting a hospital or pharmacy in this state, the person managing or in charge of a hospital or pharmacy, or the person in charge of a ward or part of a hospital." The report may include the identification of the perpetrator, if known.* MCL 750.411(1); MSA 28.643(1).

*See also Section 5.6 on the hearsay exception for statements made for purpose of medical diagnosis or treatment.

Failure to make the required report is a misdemeanor. MCL 750.411(3); MSA 28.643(3).

MCL 750.411(6); MSA 28.643(6) further provides that the physician-patient privilege and other health professional-patient privileges are not violated when the required report is made:

> "(6) The physician-patient privilege created under [MCL 600.2157; MSA 27A.2157], a health professional-patient privilege created under [MCL 333.16101 to 333.18838; MSA 14.15(16101) to 14.15(18838)] and any other health professional-patient privilege created or recognized by law do not apply to a report made under subsection (1) or (2), are not valid reasons for a failure to comply with subsection (1) or (2), and are not a defense to a misdemeanor charge filed under this section."

Other exceptions to the physician-patient privilege exist in cases where a patient brings a malpractice action. MCL 600.2157; MSA 27A.2157. The privilege is also abrogated with respect to information that must be disclosed under the Child Protection Law, which is discussed in Section 5.10(G).

F. Clergy

MCL 600.2156; MSA 27A.2156 provides the following protection for communications made to a member of the clergy:

> "No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."

This privilege is abrogated under the Child Protection Law. See MCL 722.631; MSA 25.248(11), quoted at Section 5.10(G).

G. Abrogation of Privileges in Cases Involving Suspected Child Abuse or Neglect

The Child Protection Law, at MCL 722.623(1); MSA 25.248(3)(1), imposes a duty to report suspected child abuse or neglect to the Family Independence Agency, as follows:

> "A physician, coroner, dentist, registered dental hygienist, medical examiner, nurse, a person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, certified social worker, social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the [Family Independence Agency]. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act."

Consistent with the foregoing reporting requirements, MCL 722.631; MSA 25.248(11) provides as follows:

> "Any legally recognized privileged communication except that between attorney and client is abrogated and shall neither constitute grounds for excusing a report otherwise required to be made nor for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]."

MCL 600.2157a(2); MSA 27A.2157(1)(2) specifically abrogates the privilege for communications between a sexual assault or domestic violence victim and a sexual assault or domestic violence counselor in cases where a report is required under the foregoing provisions of the Child Protection Law.

See also MCL 330.1748a; MSA 14.800(748a) and MCL 333.16281; MSA 14.15(16281) (abrogation of physician-patient, dentist-patient, counselor-client, psychologist-patient, and other health professional-patient privileges when mental health or medical records or information is released, upon request, to the Family Independence Agency for investigation of suspected child abuse or neglect.)

H. Pretrial Discovery of Privileged Records in Felony Cases

In felony cases, MCR 6.201(C) governs pretrial discovery of records protected by privilege. This rule states:

> "(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).
>
> "(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records

> protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in-camera inspection of the records.
>
> "(a) If the privilege is absolute,* and the privilege holder refuses to waive the privilege to permit an in-camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
>
> "(b) If the court is satisfied, following an in-camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
>
> "(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
>
> "(d) The court shall seal and preserve the records for review in the event of an appeal
>
> "(i) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
>
> "(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
>
> "(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide."

*An absolute privilege is one requiring express waiver by the holder. *People v Stanaway,* 446 Mich 643, 683 (1994).

For a discussion of what constitutes "material" evidence under MCR 6.201(C)(2), see *People v Fink*, 456 Mich 449, 459 (1998):

> "[T]he touchstone of materiality...is a 'reasonable probability' of a different result. The question is whether, in the absence of the disputed evidence, the defendant received a fair trial, i.e., a trial resulting in a verdict worthy of confidence. The suppressed evidence must be considered collectively, not item by item."

MCR 6.201(C)(2) is a codification of procedures set forth in *People v Stanaway,* 446 Mich 643 (1994). In *Stanaway,* the Michigan Supreme Court considered the circumstances under which two defendants charged with criminal sexual conduct could discover records of psychologists, sexual assault counselors, social workers, and juvenile diversion officers who counseled the complainants. The Court held:

> "[W]here a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense. Only when the trial court finds such evidence, should it be provided to the defendant." 446 Mich at 649-650.

The Supreme Court further held that before a trial court may conduct an in camera inspection of privileged records, the defendant must articulate "a good-faith belief, grounded on some demonstrable fact, that there is a

reasonable probability that the records are likely to contain material information necessary to the defense." 446 Mich at 677. In the cases before it in *Stanaway*, the Court determined that:

- A general assertion that privileged records might contain evidence useful for impeachment was insufficient to justify an in camera inspection by the trial court. 446 Mich at 681.
- A defense theory that a past trauma had caused the complainant to make false accusations was specific enough to justify an in camera inspection of the complainant's privileged counseling records. 446 Mich at 682-683.

Regarding procedures for considering defense requests for privileged records, the Supreme Court in *Stanaway* set forth these guidelines:

- The trial court should supply evidence to defense counsel only after it has conducted the in camera inspection and determined that the records reveal evidence necessary to the defense. 446 Mich at 679.
- The presence of defense counsel at the in camera inspection is not essential to protect the defendant's constitutional rights and would undermine the privilege unnecessarily. 446 Mich at 679.
- Where a defendant is precluded by statutory privilege from examining counseling communications, the prosecution should not mention the content of these communications in its argument to the jury; such conduct improperly argues facts not in evidence or vouches for a witness's credibility. 446 Mich at 685-687.

5.11 Rape Shield Provisions

Because sexual abuse is one tactic employed to control victims in violent domestic relationships,* allegations of criminal sexual conduct between intimate partners are not uncommon. Michigan law permits prosecution of such offenses. See MCL 750.520*l*; MSA 28.788(12), which specifically provides that an individual may be convicted of criminal sexual conduct even though the complainant is the individual's spouse.

*On abusive tactics, see Section 1.5.

In cases involving sexual conduct crimes, MCL 750.520j; MSA 28.788(10) and MRE 404(a)(3) generally prevent the defendant from introducing evidence of the complainant's past sexual conduct, with exceptions for cases where:

- The evidence would pertain to a specific instance of sexual activity and show the source or origin of semen, pregnancy, or disease; or,
- The complainant's past sexual conduct was with the defendant.

Additionally, evidence of a complainant's past sexual conduct with a person other than the defendant may be admissible in limited circumstances to show bias, prior false accusations of improper sexual conduct, or ulterior motives for making a false charge. This exception to the general rule applies in cases

where admission of such evidence is necessary to protect the defendant's constitutional rights to confrontation and cross-examination.

This section discusses the substantive and procedural prerequisites for the introduction of evidence in the foregoing exceptional circumstances.

A. Authorities Governing Admission of Evidence of Past Sexual Conduct

MCL 750.520j; MSA 28.788(10) restricts the defendant from introducing evidence of the complainant's sexual conduct as follows:

*The cross-referenced statutes govern criminal sexual conduct offenses.

> "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under [MCL 750.520b to 750.520g; MSA 28.788(2) to 28.788(7)]* unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> "(a) Evidence of the victim's past sexual conduct with the actor.
>
> "(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

MRE 404(a)(3) provides:

> "(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except
>
> ...
>
> "(3) *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease..."

The foregoing statute and court rule reflect the policy determination that unlimited inquiry into the sexual history of a complainant in a criminal sexual conduct case may violate the complainant's legitimate expectations of privacy, harass or humiliate the complainant, deter the reporting and prosecution of sexual offenses, and unfairly prejudice and mislead the jury. See *People v Arenda*, 416 Mich 1, 8-11 (1982).

> **Note:** MCL 750.520j(1); MSA 28.788(10)(1) and MRE 403 contain different expressions of the principle that relevant evidence may be excluded if its inflammatory or prejudicial nature outweighs its probative value. MRE 403 provides for exclusion of evidence where "its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The statute states that evidence may be excluded if "its inflammatory or prejudicial nature *does not outweigh* its probative value." [Emphasis added.] The Michigan Supreme Court has not squarely addressed the questions that arise from these two different

standards. The Court indicated that MRE 403 should control in *People v Hackett,* 421 Mich 338, 351 (1984), but later indicated a preference for the statute's approach in *People v Adair,* 452 Mich 473, 485 (1996). Although the Court did not specify that the factual situation before it in these cases was significant regarding the standard for excluding otherwise relevant evidence, it is interesting to note that *Hackett* involved the complainant's prior conduct with persons other than the defendant, while *Adair* involved conduct with the defendant. For discussion of the questions arising from the different language in the statute and MRE 403, see *McDougall v Schanz*, 461 Mich 15, 44-46 (1999), (dissenting opinion of Justice Cavanagh), and *People v LaLone,* 432 Mich 103, 118-119, 134-138 (1989) (concurring and dissenting opinion of Justice Archer).

In addition to MCL 750.520j; MSA 28.788(10) and MRE 404(a)(3), courts must consider the defendant's rights to confrontation and cross-examination under the Sixth Amendment to the U.S. Constitution and Const 1963, art 1, §20. These constitutional provisions protect the defendant's right to present evidence that is relevant to the defense, and to test the truth of a witness's testimony. In cases where evidence concerns a complainant's sexual conduct with a person other than the defendant, the Michigan Supreme Court has held that it may be admissible in limited situations to show bias, ulterior motives for making a false charge, or prior false accusations. However, the Court has noted that such evidence is generally not admissible to prove consent or to impeach the complainant's credibility. *People v Hackett, supra,* 421 Mich at 347-348.

In determining the admissibility of evidence of a complaining witness's past sexual conduct, a trial court is to proceed on a case-by-case basis. *People v Arenda, supra,* 416 Mich at 13, *People v Adair, supra,* 452 Mich at 483. See also *People v Lucas (On Remand)*, 193 Mich App 298, 302 (1992). To decide whether evidence should be excluded, courts should balance the following concerns:

- The defendant's rights to confrontation and cross-examination are not unlimited and must be balanced against the competing policies expressed in Michigan's rape shield provisions. The determination of admissibility is addressed to the sound discretion of the trial court and exclusion of evidence of a complainant's sexual conduct should be favored unless exclusion would abridge the defendant's right to confrontation. *People v Hackett, supra,* 421 Mich at 346-349.
- If admission of evidence of a complainant's sexual conduct is necessary to protect the defendant's constitutional right to confrontation, the court should take steps to minimize harassment or humiliation of the complainant, or invasion of the complainant's legitimate expectations of privacy. Such steps might include guarding against excess cross-examination or adducing the evidence from a source other than the complainant. *People v Morse,* 231 Mich App 424, 435-436, 438 (1998).
- The right to confrontation does not include the right to present irrelevant evidence. MRE 402 and *People v Arenda, supra*, 416 Mich at 8.

B. Illustrative Cases

1. Nature of Admissible Evidence

F *People v Ivers*, 459 Mich 320 (1998):

The defendant was convicted of third-degree criminal sexual conduct. The complainant was a young woman who met the defendant on the day of the alleged assault. The defense was consent. Pursuant to the prosecutor's request, the trial court excluded testimony by the complainant's friend that, on the night of the alleged assault, the complainant said that she had discussed birth control with her mother and was "ready to have sex." The trial court ruled that admission of the evidence was precluded under the rape shield statute. Over defense objection, the trial court also excluded testimony by the complainant's friend that the complainant had asked her friend to "find her a guy" on the night of the alleged assault. Affirming the Court of Appeals' reversal of the defendant's conviction, the Supreme Court found that the excluded evidence was not inadmissible under the rape shield statute since it did not reveal any prior sexual activity by the complainant. 459 Mich at 328. The Court explained that, under different circumstances, evidence of a complainant's statements may be excluded under the statute:

> "This is not to say, however, that no 'statement' would ever be precluded under the rape-shield statute. For example, hypothetically, had the complainant's statement referenced particular acts, i.e., "I'm ready to have sex at college since I had sex with X after our high school graduation party," that would clearly seem to be inadmissible as evidence of 'specific instances of the victim's sexual conduct,' despite having some bearing on the victim's present mental state. Likewise, 'statements' or references to 'statements' made in the course of what is referred to in common parlance as 'phone sex' themselves would seem to amount to a prior instance of sexual conduct, and thus be precluded. The important distinction, however, is not so much 'statements' versus 'conduct' as whether the statements do or do not *amount* to or *reference* specific conduct. Here it is plain that they do neither, and, thus, evidence of the statements would not be barred by rape-shield concerns." 459 Mich at 328-329.

F *People v Wilhelm,* 190 Mich App 574, 584-586 (1991):

To support his defense of consent to charges that he had sexually assaulted the complainant, defendant sought to introduce evidence that she had exposed her breasts to two other men in a bar on the night of the assault, and permitted one of the men to touch them. The Court of Appeals found that the complainant's conduct with the other men amounted to "sexual conduct" for purposes of the rape shield statute, but held that this evidence was properly excluded under the statute because it was not conduct with the defendant, even though the defendant viewed it. The Court further found that exclusion of the evidence did not violate defendant's constitutional right to confrontation because the evidence was not relevant to whether the complainant consented to sexual intercourse with him.

F *People v Mikula,* 84 Mich App 108, 115 (1978):

In a prosecution for first-degree criminal sexual conduct in which the prosecutor introduced expert testimony about the condition of the complainant's genital area to establish penetration, evidence of prior specific instances of the complainant's sexual activity was admissible to show the origin of her physical condition, even though the particular condition was not specifically listed in the rape shield statute.

2. Evidence of Prior Sexual Conduct Involving the Defendant

F *People v Adair,* 452 Mich 473 (1996):

The defendant was charged with sexually assaulting his wife. The alleged assault occurred a few days after the complainant had been served with divorce papers. She had been married to the defendant for six years at the time, and was sharing the same house with him. At the time of the alleged assault, the complainant was sleeping in the basement. She testified at the preliminary examination that the defendant awakened her in the early morning hours, and committed acts of digital-anal and digital-oral penetration against her will. At a pretrial hearing held five days prior to the preliminary examination, the complainant stated that she had engaged in consensual sexual relations with the defendant after the alleged assault, and that digital-anal sexual activity was a common practice in the couple's marriage. Defendant sought to introduce evidence of specific instances of the complainant's subsequent consensual sexual relations with him and the marital practice of digital-anal sexual activity. The trial court allowed introduction only of complainant's subsequent consensual sexual relations with the defendant that occurred within 30 days after the alleged assault, and an interlocutory appeal was taken.

The Supreme Court first considered whether the word "past" in MCL 750.520j(1)(a); MSA 28.788(10)(1)(a) refers to the period of time before the alleged assault or before the evidence is offered at trial. Finding this provision ambiguous, the Court noted that the primary legislative purpose of the statute is to exclude irrelevant evidence of the victim's sexual conduct with persons other than the defendant. 452 Mich at 480. With this purpose in mind, the Court held that "past" sexual conduct refers to conduct that has occurred before the evidence is offered at trial. The Court reasoned as follows:

> "The rape-shield statute was grounded in the evidentiary principle of balancing probative value against the dangers of unfair prejudice, inflammatory testimony, and misleading the jurors to improper issues. Where the proposed evidence concerns consensual sexual conduct with third parties, the Legislature has determined that, with very limited exceptions, the balance overwhelmingly tips in favor of exclusion as a matter of law. However, where the proposed evidence concerns consensual sexual conduct with the defendant, the Legislature has left the determination of admissibility to a case-by-case evaluation.
>
> "It is axiomatic that relevance flows from the circumstances and the issues in the case. It is primarily for this reason that we reject the argument that otherwise relevant evidence becomes legally irrelevant and inadmissible merely because it occurred after an alleged sexual assault and not before." 452 Mich at 483.

The Court remanded the case to the trial court for a determination of whether the materiality of the proposed evidence was outweighed by its prejudicial nature. In making this determination, the Court advised the trial court to consider: 1) the proximity in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with her alleged assailant; and, 2) the circumstances and nature of the relationship between the complainant and defendant. 452 Mich at 486-488. The Court further held that evidence of the couple's digital-anal sexual activity was properly excluded because it was not relevant to an element of the charges against defendant, or to his claim that the assault never occurred. 452 Mich at 488-489.

F *People v Johnson*, 245 Mich App 243 (2001):

The defendant was convicted of two counts of kidnapping and one count of domestic violence. The complainant was a woman who dated the defendant for six weeks but whose relationship with the defendant ended one week before the events at issue. The defense theory was that the complainant made false allegations against the defendant in retaliation for her having contracted herpes from him. The prosecutor moved before trial to exclude evidence that the defendant had transmitted herpes to the complainant. The trial court granted the motion, finding that the evidence was irrelevant. On appeal, Judge O'Connell, with Judge Kelly concurring in the result only and Judge Whitbeck dissenting on another ground, found the evidence relevant to establish that the complainant was biased and that her testimony was fabricated. However, Judge O'Connell found no reversible error in the exclusion of the evidence, because he found that it was inflammatory and that its prejudicial nature outweighed its probative value. Judge O'Connell further noted that, even without this evidence, defense counsel had cross-examined the complainant extensively in his attempt to impeach her credibility

3. Evidence of Prior Sexual Conduct Involving a Person Other Than the Defendant

F *People v Arenda*, 416 Mich 1 (1982):

In this case the defendant sought to admit evidence of an eight-year-old complainant's possible sexual conduct with others to explain the complainant's ability to describe the sexual acts that allegedly occurred, and to dispel the inference that this ability resulted from experiences with the defendant. The Supreme Court balanced the potential prejudicial nature of this evidence against its probative value and found that application of the rape shield statute to preclude it did not infringe on the defendant's right to confrontation. The Court noted that other means were available by which the defendant could cross-examine the complainant as to his ability to describe the alleged conduct. 416 Mich at 14. The Court left for future case-by-case determination the question whether under different sets of circumstances the statute's prohibitions would be unconstitutional as applied. 416 Mich at 13.

F *People v Hackett,* 421 Mich 338 (1984):

In two cases consolidated on appeal, each defendant challenged the trial court's decision to exclude evidence of the complainant's sexual reputation and prior sexual conduct with persons other than the defendant. In each case, the evidence was offered to show the complainant's consent; the defendant in *Hackett* further sought to impeach the complainant's credibility. Each defendant asserted on appeal that exclusion of the evidence violated the Sixth Amendment right to confrontation and cross-examination. The Supreme Court found in each case that the trial court's exclusion of the evidence under the rape shield statute was consistent with constitutional requirements, holding that evidence of reputation and prior sexual conduct is not relevant to questions of consent or credibility. The Court further stated that the prohibitions in the rape shield statute do not apply to all cases in which a defendant seeks to introduce evidence of reputation or prior sexual conduct with persons other than the defendant —it described certain limited circumstances in which admission of such evidence would be necessary to preserve the right to confrontation:

> "We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted....Morevoer in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge....Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past....The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." 421 Mich at 348-349.

4. Evidence of Complainant's Virginity

In *People v Bone*, 230 Mich App 699 (1998), the defendant's defense to charges of third-degree criminal sexual conduct was consent. The Court of Appeals found reversible error in the prosecutor's references to the 16-year-old complainant's virginity and in admission of the complainant's testimony that she did not scream or resist the defendant's sexual assaults because she had never had sexual intercourse and she was afraid the defendant would hurt her. The Court of Appeals found that MRE 404(a)(3) precludes the use of a complainant's virginity to show unwillingness to consent to sexual conduct. 230 Mich App at 702.

C. Procedures Under MCL 750.520j(2); MSA 28.788(10)(2)

The Michigan Legislature and Supreme Court have set forth notice and hearing procedures for defendants who wish to introduce evidence of a

complainant's prior sexual conduct under an exception to the rape shield provisions. The U.S. Supreme Court has considered whether the trial court may constitutionally exclude such evidence in a case where the defendant failed to conform to the statutory notice requirements.

1. Notice and Hearing Requirements

MCL 750.520j(2); MSA 28.788(10)(2) requires the defendant to provide notice of his or her intent to offer evidence of the complainant's prior sexual conduct:

> "If the defendant proposes to offer evidence [of the complainant's sexual conduct with the defendant or of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease] described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

In *People v Hackett,* 421 Mich 338, 349-350 (1984), the Supreme Court extended the purpose of the statutory in camera hearing to include consideration of the defendant's right to confrontation in cases where the exceptions listed in MCL 750.520j(1); MSA 28.788(10(1) do not apply. The Court then gave the following description of how the trial court should conduct the proceedings:

> "The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions." 421 Mich at 350-351. [Citations omitted.]

See also *People v Morse,* 231 Mich App 424 (1998), in which the defendant was charged with multiple counts of criminal sexual conduct against the daughters of his former wife. The trial court ruled that the rape shield statute prohibited admission of evidence of the complainants' prior sexual mistreatment by someone other than the defendant. The evidence was proffered to show that the complainants' age-inappropriate sexual knowledge was not learned from the defendant and to show their motive to make false charges against the defendant. The Court of Appeals found that to preserve the defendant's constitutional right to confrontation, "the trial court may admit

such evidence after adhering to certain safeguards." 231 Mich App at 436. The trial court was directed to conduct an in camera hearing to determine whether: 1) the proffered evidence was relevant, 2) the defendant could show that another person was convicted of criminal sexual conduct involving the complainants, and 3) there was sufficient similarity between the facts underlying the previous conviction and the instant charges. 231 Mich App at 437.

The sufficiency of a defendant's offer of proof was at issue in *People v Williams*, 191 Mich App 269, 273-274 (1991). Here, the trial court refused to permit the defendant to question the complainant about an alleged prior sexual assault against her by her uncle. On appeal, defendant asserted that this inquiry would have impeached the complainant's credibility by showing that she had made a prior false accusation of sexual assault. The Court of Appeals upheld the trial court's decision to limit the defendant's inquiry:

> "[D]efendant has been unable to offer any concrete evidence to establish that the victim had made a prior false accusation of being sexually abused by her uncle....No criminal charges were pursued against the uncle and, therefore, there had never been a determination by a court of the truth or falsity of the accusation....[D]efense counsel had no idea whether the prior accusation was true or false and no basis for believing that the prior accusation was false. Counsel merely wished to engage in a fishing expedition in hopes of being able to uncover some basis for arguing that the prior accusation was false."

2. Effect of Defendant's Violation of Notice Requirements

Violation of the notice provisions of the rape shield statute may result in preclusion of the proffered evidence so long as this preclusion does not infringe on the defendant's Sixth Amendment rights. *People v Lucas (On Remand)*, 193 Mich App 298, 301-302 (1992). In the *Lucas* case, the defendant was accused of criminal sexual conduct against his former girlfriend. To support his defense of consent, he sought to introduce evidence of their past sexual relationship by way of an oral motion at the start of trial, without complying with the notice requirements of the rape shield statute. The trial court refused to allow introduction of the evidence, based solely on the defendant's failure to comply with the statutory notice requirements. Defendant was convicted following a bench trial of two counts of third-degree criminal sexual conduct. After various proceedings on appeal, the U.S. Supreme Court held that the notice requirement in the Michigan rape shield statute does not per se violate the defendant's rights under the Sixth Amendment, but left it to the Michigan courts to decide whether the defendant's rights had been violated in the *Lucas* case. *Michigan v Lucas*, 500 US 145, 152-153 (1991). On remand from the U.S. Supreme Court, the Michigan Court of Appeals held that the constitutionality of preclusions based on the statutory notice requirement must be determined on a case-by-case basis. 193 Mich App at 302. In making this determination, the court should consider the following factors:

- The purpose of the statute to encourage the reporting of assaults by protecting victims from surprise, harassment, unnecessary invasion of privacy, and undue delay. 193 Mich App at 302-303.
- The purpose of the statute to prevent surprise to the prosecution and to allow time to investigate whether the alleged prior relationship existed. 193 Mich App at 302.
- The timing of the defendant's offer to produce evidence. The closer to the date of trial the evidence is offered, the more wilful misconduct designed to create a tactical advantage is suggested. 193 Mich App at 303.

The Court of Appeals remanded the case to the trial court to make findings based on the foregoing factors. The Court of Appeals ultimately affirmed the defendant's conviction in *Lucas*, after the trial court determined that defense counsel was aware of the statute's notice requirements and made a tactical decision to move to admit the evidence on the date of trial. Moreover, preclusion of the evidence did not prevent defense counsel from presenting defendant's defense of consent, because there was sufficient evidence presented of the parties' prior relationship to support it. *People v Lucas* (*After Remand*), 201 Mich App 717, 719 (1993).

5.12 Evidence of Other Crimes, Wrongs, or Acts Under MRE 404(b)

This section discusses the substantive and procedural criteria for admitting evidence of other crimes, wrongs, or acts under MRE 404(b), and digests recent cases in which the Michigan appellate courts have ruled on the admissibility of other acts evidence in the context of criminal cases involving family violence.

A. Admissibility of Evidence Under MRE 404(b)

MRE 404(b)(1) governs evidence of other crimes, wrongs, or acts, as follows:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

MRE 404(b) codifies the requirements set forth in *People v VanderVliet,* 444 Mich 52 (1993). In *VanderVliet*, the Michigan Supreme Court directed the state's bench and bar to employ the following standards in assessing the admissibility of evidence of other crimes, wrongs, or acts:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime. 444 Mich at 74.

- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial. 444 Mich at 74.
- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other facts appropriate for making a decision of this kind. 444 Mich at 74-75.
- Upon request, the trial court may provide a limiting instruction under MRE 105, cautioning the jury to use the evidence for its proper purpose, and not to infer a bad or criminal character that caused the defendant to commit the charged offense. 444 Mich at 75.

The Supreme Court in *VanderVliet* characterized MRE 404(b) as an inclusionary, rather than an exclusionary, rule:

> "There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith...Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." 444 Mich at 65.

The *VanderVliet* case underscores the following principles of MRE 404(b):

- There is no presumption that other acts evidence should be excluded. 444 Mich at 65.
- The Rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except criminal propensity. 444 Mich at 65.
- A defendant's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial. 444 Mich at 78-79.
- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. 444 Mich at 68, 71.

The continuing viability of *VanderVliet's* analytical framework was affirmed in *People v Sabin*, 463 Mich 43, 55-59 (2000). This case is discussed in Section 5.12(C).

B. Procedure for Determining the Admissibility of Evidence of Other Crimes, Wrongs, or Acts; Limiting Instructions

MRE 404(b)(2) generally provides that the prosecution must give advance notice (preferably before trial) of intent to use other acts evidence, and of its rationale for admitting the evidence. MRE 404(b)(2) states:

> "The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination."

In *People v Hawkins*, 245 Mich App 439, 454-455 (2001), the Court of Appeals identified the following purposes of the notice requirement set forth in MRE 404(b)(2): 1) to force the prosecutor to identify and seek admission of only relevant evidence; 2) to ensure that the defendant has an opportunity to object to and defend against evidence offered under MRE 404(b); and 3) to facilitate a thoughtful ruling on admissibility by the trial court based on an adequate record. In *Hawkins*, the Court of Appeals held that the prosecutor's failure to adhere to the requirements of MRE 404(b)(2) was not reversible error because there was no evidence suggesting that the lack of notice affected the defense or outcome of the case. 245 Mich App at 455-456.

The trial court may make its determination of admissibility pursuant to MRE 104, at a hearing conducted in the absence of the jury. The trial court is not bound by the Rules of Evidence at such a hearing, except those with respect to privileges. Failure to conduct an evidentiary hearing on the admissibility of other acts evidence is not reversible error where the defense makes no motion in limine. *People v Williamson,* 205 Mich App 592, 596 (1994).

Where pretrial procedures do not furnish a record basis to reliably determine the relevance and admissibility of other acts evidence, the Supreme Court in *VanderVliet* had the following advice:

> "[T]he trial court should employ its authority to control the order of proofs [under MRE 611], require the prosecution to present its case in chief, and delay ruling on the proffered other acts evidence until after the examination and cross-examination of prosecution witnesses. If the court still remains uncertain of an appropriate ruling at the conclusion of the prosecutor's other proofs, it should permit the use of other acts evidence on rebuttal, or allow the prosecution to reopen its proofs after the defense rests, if it is persuaded in light of all the evidence presented at trial, that the other acts evidence is necessary to allow the jury to properly understand the issues." *People v VanderVliet*, 444 Mich 52, 90 (1993).

Evidence admissible for one purpose is not made inadmissible because its use for a different purpose is precluded. If evidence is admissible for one purpose, but not others, the trial court must give a limiting instruction upon request, pursuant to MRE 105. *People v Sabin*, 463 Mich 43, 56 (2000), *People v VanderVliet, supra*, 444 Mich at 73-75, and *People v Basinger,* 203 Mich App 603, 606 (1994) (absence of opportunity to request a limiting instruction was grounds for reversal, for it denied defendant a fair trial); *People v DerMartzex,* 390 Mich 410, 417 (1973) (failure to give properly requested instruction is

reversible error). The trial court has no duty to give a limiting instruction sua sponte, however. *People v Chism,* 390 Mich 104, 120-121 (1973).

For a jury instruction on evidence of other offenses where relevance is limited to a particular issue, see CJI2d 4.11.

C. Other Acts Evidence in Family Violence Cases

The following appellate cases are relevant to the application of MRE 404(b) in situations involving family violence.

F *People v Sabin (After Remand)*, 463 Mich 43 (2000):

The defendant was convicted of first-degree criminal sexual conduct, based on a single incident of sexual intercourse between the defendant and his 13-year-old daughter. According to the complainant, the defendant told her after the assault that, if she told her mother, her mother would be upset with her for breaking up the family again. Over the defendant's objection, his stepdaughter testified that he performed acts of oral sex on her from the time she was in kindergarten until she was in seventh grade. She testified that the defendant told her not to tell anyone about his conduct because it would hurt the family and because her mother would be angry with them.

The Supreme Court affirmed the conviction, finding no error in the trial court's admission of the stepdaughter's testimony as relevant to the defendant's scheme, plan or system. The Supreme Court identified two situations in which evidence of prior acts may properly be offered to show a defendant's scheme, plan or system: 1) where the charged act and the uncharged act are parts of a single continuing plan; and 2) where the defendant devised and repeated a plan to perpetrate separate but very similar crimes. 463 Mich at 63-64. The instant case presented the second situation and, notwithstanding dissimilarities between the charged and uncharged acts, the Court found no abuse of discretion in the trial court's admission of the challenged testimony to prove the defendant's scheme, plan or system. The following common features beyond the commission of acts of sexual abuse supported the trial court's discretionary ruling: the father-daughter relationship, the similar ages of the victims, and the defendant's attempt to silence the victims by playing on their fears of breaking up the family. The evidence was probative of a disputed element — whether sexual penetration occurred — and was properly admitted to show a system that the defendant may have used in sexually assaulting his daughters and, consequently, to rebut the defense of fabrication. The Court noted, however, that, under the facts presented, the evidence was not admissible to show motive, intent or absence of mistake, or to bolster the credibility of the victim. 463 Mich at 66-71.

See also *People v Pesquera*, 244 Mich App 305, 319 (2001), where the Court of Appeals considered similar common factors in upholding the trial court's decision to admit testimony regarding uncharged sexual assaults on persons other than the victim for the purpose of showing a scheme, plan, or system.

F *People v Starr,* 457 Mich 490 (1998):

Defendant was convicted of criminal sexual conduct against his six-year-old daughter. At trial, the court permitted the prosecutor to introduce testimony by the defendant's half-sister that the defendant had subjected her to similar uncharged sexual acts over a 14-year period that began when she was four years old. The court gave the jury a limiting instruction regarding this evidence. On appeal from his conviction, the defendant asserted that his half-sister's testimony should not have been admitted into evidence because its prejudicial nature substantially outweighed its probative value. Applying the *VanderVliet* standard, the Supreme Court upheld the trial court's decision to admit the half-sister's testimony. The Court found that this evidence was offered for a proper, noncharacter purpose, to rebut a claim that the complainant's mother had fabricated the allegations of sexual abuse to gain an advantage in a visitation dispute after her divorce from the defendant. 457 Mich at 501-502. The Court further found that the evidence was substantially more probative than prejudicial because it was the only evidence that effectively refuted the claim of fabrication and explained the mother's two-year delay in reporting the crime. 457 Mich at 502-503.

For another case in which evidence of a similar prior uncharged sexual assault was found admissible to rebut the defendant's theory that the victim of the charged assault fabricated her allegations, see *People v Layher*, 238 Mich App 573, 584-586 (1999), lv granted on other grounds 463 Mich 906 (2000).

F *People v Sholl,* 453 Mich 730, 740-742 (1996):

Defendant was convicted of third-degree criminal sexual conduct against a complainant with whom he had a dating relationship. On appeal, he objected to the trial court's decision to admit evidence that he had used marijuana on the evening when he and the complainant had sexual relations. The Supreme Court upheld the trial court's decision to admit this evidence of a prior bad act:

> "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place. The presence or absence of marijuana could have affected more than the defendant's memory. It could have affected the behavior of anyone who used the drug....In this case, a jury was called upon to decide what happened during a private event between two persons. The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty....Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." 453 Mich 741-742.

F *People v DerMartzex,* 390 Mich 410, 415 (1973):

In this case decided before the adoption of MRE 404(b) in its current form, the Supreme Court held that relevant, probative evidence of other sexual acts between the defendant and the victim of an alleged sexual assault may be admissible if the defendant and victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. The Supreme Court has declined to extend the holding in this case to

sexual acts between a defendant and household members other than the complainant, however. *People v Jones*, 417 Mich 285 (1983).

Note: The Supreme Court has declined to reconsider its decision in *Jones. People v Sabin, supra*, 463 Mich at 69-70.

F *People v Watson*, 245 Mich App 572 (2001):*

People v Watson is also discussed in Section 5.4(B).

The defendant was convicted of several offenses, including three counts of first-degree criminal sexual conduct against his stepdaughter, who was between 11 and 13 years old at the time of the offenses. On appeal, the defendant challenged the trial court's admission into evidence of a cropped photograph found in the defendant's wallet, which showed the victim's naked buttocks. The defendant also challenged the admission of an enlargement showing the entire, uncropped photograph. The Court of Appeals found no reversible error in admission of this evidence, ruling that it was properly admitted under MRE 404(b) to show the defendant's motive:

> "[E]vidence in the instant case that defendant had a sexual interest specifically in his stepdaughter would show more than simply his sexually deviant character — it would show his motive for sexually assaulting his stepdaughter. Thus, evidence that defendant carried a photograph of his stepdaughter's naked buttocks in his wallet had probative value to show that the victim's allegations were true. Defendant denied sexually assaulting his stepdaughter, but the other-acts evidence demonstrated that he had a motive to engage in sexual relations with her...[T]he other-acts evidence involved the specific victim herself, not someone else.... Thus, the other-acts evidence showed more than defendant's propensity toward sexual deviancy; it showed that he had a specific sexual interest in his stepdaughter, which provided the motive for the alleged sexual assaults." 245 Mich App at 418.

The Court of Appeals further found no showing by the defendant that the probative value of the evidence was substantially outweighed by the danger of prejudice.

F *People v Daoust*, 228 Mich App 1, 11-14 (1998):*

*This case is also discussed in Section 5.8(B).

Defendant was charged with two counts of first-degree child abuse based on injuries to the head and hand of his girlfriend's daughter. In addition to these injuries, the child suffered numerous bruises. The child's mother was also charged with first-degree child abuse. She initially denied involvement with the defendant, and admitted responsibility for some of the bruises on the child's body. However, at defendant's trial she testified that the injuries to the child's head and hand were suffered while the child was in the care of the defendant. She further stated that the defendant had threatened to harm her and the child if she sought medical attention for the child's injuries, and that she had attempted to deflect the blame for the injuries away from the defendant because she was afraid of him.

A jury convicted defendant of second-degree child abuse based on the injury to the child's hand. On appeal, defendant asserted that the trial court erroneously admitted testimony regarding a prior incident in which bruises on the child's body had been reported to the police. The child's baby-sitter testified that defendant was angry with her for reporting the

bruises to the police. She further stated that defendant had told her that he liked to spank children "hard enough to where they'll feel it." Although both defendant and the child's mother told the baby-sitter that the mother had caused the bruises, the mother later testified at trial that defendant had been responsible. The Court of Appeals upheld the trial court's decision to admit this evidence, finding that it was offered for the proper purpose of explaining the relationship between the defendant, the child, and the child's mother with respect to the care and discipline of the child. Defendant testified at trial that he had never participated in the child's discipline, explaining that discipline was the mother's responsibility. The prior acts evidence tended to disprove this testimony, showing that defendant believed in extreme physical discipline and that he participated in the child's discipline. The evidence was thus probative of defendant's possible motivation for causing the charged injuries. 228 Mich App at 13-14.

F *People v Hoffman*, 225 Mich App 103 (1997):

Defendant was convicted of kidnapping and assault with intent to murder his girlfriend. During the trial, the prosecutor attempted to establish that the assault was motivated by defendant's hatred of women by calling two of defendant's former girlfriends, who testified that he had beaten and threatened them. One of these witnesses testified that defendant told her that "women are all sluts and bitches and deserve to die." Defendant sought reversal based on the assertion that the trial court abused its discretion n admitting the testimony of these witnesses. The Court of Appeals disagreed, holding that the testimony was properly admitted to establish motive under MRE 404(b). In so holding, the panel adopted the following dictionary definition of "motive":

> "Cause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act. In common usage intent and 'motive' are not infrequently regarded as one and the same thing. In law there is a distinction between them. 'Motive' is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. 'Motive' is that which incites or stimulates a person to do an act." 225 Mich App at 106, citing Black's Law Dictionary (rev 5th ed) [citations omitted].

Acknowledging that the distinction between admissible evidence of motive and inadmissible evidence of character or propensity is "often subtle," the panel gave the following hypothetical by way of illustration:

> "In mid-afternoon, on the outskirts of a rural Michigan village, an African-American man is savagely assaulted and battered by a white assailant. The assailant neither demands nor takes any money or property. The assailant is a total stranger to the victim. The defendant is later apprehended and charged with the attack. After the arrest, the prosecutor discovers that the defendant had been involved in several other violent episodes in the past, including bar fights, an assault on a police officer, and a violent confrontation with a former neighbor." 225 Mich App at 107.

Absent a proper purpose, the court noted that the foregoing other acts evidence would be inadmissible because its only relevance is to establish the defendant's violent character or propensity towards violence.

However, if the evidence showed that all of the defendant's prior victims were African-Americans, and that defendant had previously expressed hatred toward blacks, then evidence of the prior assaults would be admissible to prove motive for his conduct. This evidence goes beyond establishing a propensity toward violence, and tends to show why defendant perpetrated a seemingly random and inexplicable attack. Applying the rationale of the foregoing example to the instant case, the panel held:

> "[E]vidence that defendant hates women and previously had acted on such hostility establishes more than character or propensity. Here, the other-acts evidence was relevant and material to defendant's motive for his unprovoked, cruel, and sexually demeaning attack on his victim....Absent the other-acts evidence establishing motive, the jurors may have found it difficult to believe the victim's testimony that defendant committed the depraved and otherwise inexplicable actions. The evidence also tends to counter defendant's self-serving testimony that the victim provoked the incident by stealing his money." 225 Mich App at 109-110.

F *People v Ullah,* 216 Mich App 669, 674-676 (1996):

Defendant was convicted of two counts of first-degree criminal sexual conduct arising from a sexual assault upon his estranged wife. On appeal, defendant objected to the trial court's admission of his wife's testimony concerning a previous beating he had allegedly inflicted upon her. The Court of Appeals reversed defendant's conviction. It found that: 1) the trial court intervened too late to strike the unfairly prejudicial testimony that was not relevant to the charged offenses; 2) the prosecution had not provided notice that it intended to elicit prior acts evidence pursuant to MRE 404(b)(2); 3) the prosecution cited an improper purpose for admitting the prior acts evidence; and, 4) the jury may have given undue weight to the prior acts testimony. With regard to relevance, the Court of Appeals stated:

> "On this record the testimony regarding the prior beating was not logically relevant to an element of the charged offenses. The prior beating was not accompanied by a demand from defendant for sex. We also find that the prior beating was not relevant to the issue of consent to sexual intercourse because the complainant never testified that she, aware of how violent he could get from the earlier incident, stopped resisting him. If the complainant had testified that she fearfully submitted, the earlier beating would be relevant to vitiate the apparent consent. That situation is not found here because the complainant's resistance never wavered, and, from reviewing her testimony, we can conclude that defendant was, on this occasion, even more physically violent when he demanded sex than he had been when he physically assaulted her months earlier. We also note that the trial court determined, after the fact, that the testimony regarding the first beating was more prejudicial than probative." 216 Mich App at 675.

F *People v Fisher,* 193 Mich App 284, 289-290 (1992):

The defendant was convicted of involuntary manslaughter in connection with the disappearance of his estranged wife. The Court of Appeals reversed, finding insufficient evidence to support the conviction. The Court also commented on the admission of evidence of other acts of the defendant, including his previous assaults on his wife and subsequent acts

of violence against others. Noting that evidence of prior acts of marital violence was admissible to show the defendant's motive and his relationship with his wife, the Court found reversible error in the prosecutor's use of the evidence in his closing argument to show the defendant's violent character and his alleged conformity with that character in the disappearance of his wife.

5.13 Testimonial Evidence of Threats Against a Crime Victim or a Witness to a Crime

*For a case involving threats to a witness's relative, see *People v Johnson*, 113 Mich App 650, 654 (1982) (evidence of threat irrelevant where witness testified).

This section digests cases illustrating how Michigan's appellate courts have handled testimonial evidence of a defendant's threats of physical harm against a crime victim or a witness to a crime.* While evidence of a threat is often subject to hearsay objections, it may nonetheless be admissible on various grounds, either because the threat is not hearsay, or because it falls under an exception to the hearsay rule.

- A threat may be a non-assertive "verbal act," rather than a "statement," offered for some other purpose than to prove the truth of the matter asserted. For example, a threat may be circumstantial evidence of the declarant's state of mind (such as consciousness of guilt).
- A threat may constitute an admission by a party-opponent, which is not hearsay under MRE 801(d)(2).
- A witness's account of a threat may be admissible as an excited utterance under MRE 803(2).
- Evidence of a threat may be admissible as a statement of the declarant's then existing mental, emotional, or physical condition under MRE 803(3).

Note: Threats against a crime victim or witness to a crime may also constitute a criminal offense, such as extortion or obstruction of justice. For more information about these crimes, see Section 3.13(A)(3).

A. Statements That Are Not Hearsay

MRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

MRE 801(d)(2) specifically excludes admissions by a party-opponent from the definition of hearsay. Such statements are "offered against a party" and are "the party's own statement." *Id.*

In the following cases, the Michigan appellate courts found that testimony regarding threats against a crime victim or a witness to a crime did not constitute hearsay as defined in MRE 801. In these cases, the courts found that

the threatening statement was either: 1) non-assertive verbal conduct offered for a purpose other than to prove the truth of the matter asserted; or, 2) a party admission.

F *People v Sholl*, 453 Mich 730, 739-740 (1996) (verbal conduct showing consciousness of guilt):

The defendant was charged with third-degree criminal sexual conduct against a complainant with whom he had a dating relationship. At trial, the investigating officer testified that after the criminal proceeding against the defendant was underway, the complainant called him to report the defendant's threats against her. The officer further testified that he had asked the defendant whether the defendant had talked about killing the complainant. The defendant acknowledged that, while intoxicated, he "probably would have said something like that." The Supreme Court found no error in the trial court's admission of the officer's testimony about his conversation with the defendant:

> "A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt. As the circuit court observed, a threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case." 453 Mich at 740 [citations omitted].

F *People v Kelly*, 231 Mich App 627, 639-640 (1998) (threat as evidence explaining witness's inability to identify defendant):

The defendant was convicted of the armed robbery and murder of his former girlfriend. At trial, a prosecution witness testified that two men had offered to sell him items allegedly taken from the victim's home. When asked if he saw either of the two men in the courtroom, the witness testified, "No. I don't know." When asked if he was afraid to come to court, the witness testified that he was "a little bit afraid." The prosecutor then asked the witness three times if he was afraid to identify either of the two men. On appeal, the Court of Appeals, noting that evidence of a defendant's threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt, found that the prosecutor's questions were appropriate attempts to elicit testimony that might explain the witness's inability to identify the defendant.

F *People v Falkner,* 36 Mich App 101, 108 (1971), rev'd on other grounds 389 Mich 682 (1973) (conduct showing consciousness of guilt):

Defendant was convicted of first-degree murder. On appeal, he objected to a witness's testimony that he had threatened to kill anyone who testified against him. The Court of Appeals found no error in the trial court's decision to admit this testimony:

> "Testimony showing conduct and declarations of the defendant subsequent to commission of a crime, when the behavior indicates a consciousness of guilt or is inconsistent with innocence, is admissible. Evidence of attempts by the accused to induce witnesses not to testify may properly be considered by the fact finders."

- *People v Kowalak (On Remand)*, 215 Mich App 554 (1996) (admission by a party-opponent):

  The defendant was charged with the first-degree murder of his mother. At the defendant's preliminary examination, a witness testified that she had spoken with the victim shortly before her death. According to the witness, the victim stated that she was "petrified" because the defendant had threatened to kill her. Applying MRE 801(d)(2), the Court of Appeals concluded that the defendant's threat against the victim was not hearsay because it was an admission by a party-opponent.*

*This case is also discussed in Sections 5.3(B)(2) and 5.13(B).

B. Exceptions to the Hearsay Rule

MRE 803 governs hearsay exceptions in cases where the declarant's availability as a witness is immaterial. The Michigan appellate courts have admitted testimony regarding a defendant's threats under subsections (2) and (3) of this rule, which provide:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ...
>
> "(2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> "(3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

MRE 803(2) and (3) were applied in deciding the following cases:

- *People v Cunningham,* 398 Mich 514 (1976) (excited utterance):

  The defendant was convicted of the second-degree murder of her husband. The victim was shot to death with a rifle during an argument with the defendant. A police officer called to the scene during the fight testified at trial that he took a pistol from the victim approximately one hour before the fatal shooting. According to the officer's testimony, the victim explained that he had taken the pistol from the defendant because she had threatened to shoot him. The defendant objected to the officer's testimony regarding the threat on the basis of hearsay. The trial court overruled the objection, stating that the victim's statement was an "excited utterance." On appeal from the trial court's decision that the testimony was admissible, the defendant's conviction was affirmed by an equally divided Supreme Court. Four Justices agreed, however, that the husband's statement was inadmissible hearsay because it was not made immediately after a startling event so as to be "spontaneous and unreflecting." 398 Mich at 520 (opinion by Chief Justice Kavanagh).*

*See Section 5.3(B)(2) for more discussion of the excited utterance exception.

F *People v Kowalak (On Remand)*, 215 Mich App 554 (1996) (excited utterance):

The defendant was charged with the first-degree murder of his 82-year-old mother. On the day of her death, the victim had testified against the defendant at a child custody/visitation hearing. As a result of the victim's testimony, the defendant was denied visitation rights with his children. At the defendant's preliminary examination, a witness testified that she had spoken with the victim shortly after the visitation hearing. Over the objection of defense counsel, the witness further testified that the victim was "petrified" because the defendant had threatened to kill her for testifying against him. The trial court denied the defendant's motion to suppress the witness's testimony, ruling that the victim's statement was admissible under MRE 803(2) as an excited utterance. On appeal, the Court of Appeals affirmed the trial court's decision to admit the witness's testimony. In so doing, the Court engaged in a two-part analysis. First, the Court considered the defendant's alleged statement to his mother that he was going to kill her. Applying MRE 801(d)(2), the Court concluded that this statement was not hearsay because it was an admission by a party-opponent, i.e., a party's own statement offered against that party. Second, the Court considered whether the witness' hearsay testimony referencing the victim's statement about the alleged threat was admissible as an excited utterance. The Court concluded that it fell within the exception to the hearsay rule articulated in MRE 803(2). 215 Mich App at 556-559.

F *People v Paintman*, 92 Mich App 412, 420 (1979), rev'd on other grounds 412 Mich 518 (1982) (evidence of a then existing mental, emotional, or physical condition):

The defendant was convicted by a jury of four counts of first-degree murder. At trial, a witness testified that he saw the defendant and a codefendant leave a victim's apartment just before the bodies of that victim and two others were found in that apartment. The witness further testified that the codefendant had threatened to kill one of the victims found in the apartment. The defendant objected on appeal to the admission of testimony concerning his codefendant's threats against the victim. The Court of Appeals upheld the trial court's decision to admit this testimony, stating that it was a declaration of the codefendant's state of mind admissible as an exception to the hearsay rule. The statement was relevant to the codefendant's intent in killing the victims and therefore to the defendant's guilt as an aider and abettor.